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No. 79-253

In the Supreme Court of the United States

OCTOBER TERM, 1978

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the district court (App. B, *infra*, 3a-13a) is not yet reported. The decision of the administrative law judge (App. D, *infra*, 16a-28a) is not reported.

JURISDICTION

The judgment of the district court was entered on May 7, 1979 (App. A, *infra*, 1a-3a). A notice of

appeal to this Court was filed on May 17, 1979 (App. C, *infra*, 14a-15a). On July 12, 1979, the Chief Justice extended the time for docketing the appeal to and including August 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether Section 16(e) of the Fair Labor Standards Act, which authorizes civil penalties for violations of the Act's child labor provisions, violates the Due Process Clause of the Fifth Amendment because it permits sums collected as civil penalties to be applied toward reimbursement of the costs of enforcing the child labor laws.

2. Whether, if the provision of Section 16(e) relating to the use of civil penalty funds violates due process, that provision is severable from the remainder of the section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Section 16(e) of the Fair Labor Standards Act, 29 U.S.C. 216(e), provides in pertinent part:

> Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall

> be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. * * * Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title.

29 U.S.C. 9a provides:

> All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States.

STATEMENT

1. Section 12 of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 212, prohibits the employment of "oppressive child labor," as defined in the statute and regulations promulgated by the Secretary of Labor. In 1974 Congress amended the Act to add Section 16(e), 29 U.S.C. 216(e), which authorizes the Secretary to assess a civil penalty of not more than $1,000 for each violation of the child labor provisions.[1] Section 16(e) directs the Secretary, in determining the amount of the penalty, to consider "the size of the business of the person charged and the gravity of the violation * * *."

When the Secretary or his delegate assesses a penalty against an employer, Section 16(e) and its implementing regulations give the employer a right to file exceptions to the assessment. In that event the existence of the violation and the amount of the penalty are determined de novo by an administrative law judge, after a hearing conducted pursuant to the Administrative Procedure Act (5 U.S.C. 554), in which the Secretary bears the burden of proof (29 C.F.R. 580.21(a)). The decision of the administrative law judge constitutes the final administrative decision on the matter (29 C.F.R. 580.32), and thereafter, an employer aggrieved by that decision may obtain judicial review (5 U.S.C. 702, 704).

[1] Section 25(c) of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. Before the 1974 amendment the Act provided, and still provides, an injunctive remedy against child labor violations (29 U.S.C. 212(b), 217) and for criminal penalties in the case of willful violations (29 U.S.C. 216(a)).

Section 16(e) further provides that "[s]ums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title." 29 U.S.C. 9a, in turn, provides that sums collected "shall be deposited to the credit of the appropriation" of the office within the Department of Labor which supervised the work and that such funds "may be used, in the discretion of the Secretary of Labor," to meet the expenses of that office.

The Secretary has delegated his responsibility for enforcing the child labor provisions of the Act to the Employment Standards Administration (ESA). 36 Fed. Reg. 8755 (1971). The authority to assess civil penalties is exercised by ESA's assistant regional administrators.

2. Appellee operates a chain of restaurants in the southeastern United States (App. B, *infra*, 4a). In 1975, following an investigation, the ESA assistant regional administrator in the Atlanta regional office found that appellee had committed 169 separate violations of the child labor laws. He assessed civil penalties against appellee totalling $103,000. Appellee filed exceptions to the determination of the violations. After a hearing, the administrative law judge concluded that the existence of the violations was clearly established, but he reduced the

amount of the penalties to $18,500 (App. D, *infra*, 27a-28a).[2]

Appellee did not seek judicial review of the administrative law judge's ruling and, indeed, has never challenged the merits of that decision. Instead, it filed this action in the United States District Court for the District of Columbia, seeking a declaratory judgment that Section 16(e) is unconstitutional and an injunction prohibiting its enforcement. Appellee contended that the reimbursement provisions of the statute (and, by reference, 29 U.S.C. 9a), which authorize the allocation of civil penalty funds to the offices that investigate and assess penalties for child labor violations, create an impermissible risk of bias, in violation of the Due Process Clause.

The record developed in the district court established the following facts, which appellee did not dispute. Under the statutory scheme, the amount of monies collected as child labor penalties does not affect the compensation of any official involved in the assessment of those penalties or the investigation of the underlying violations.[3] For fiscal years 1976, 1977 and 1978, ESA collected the following approximate

[2] The assistant regional administrator had assessed an additional $84,500 because he regarded the violations as willful. The violations were of the same type as those that had been disclosed in the course of several previous investigations of appellee's premises. The administrative law judge decided, however, that the company did not have sufficient reason to know that the violations were recurring (App. D, *infra*, 26a-27a).

[3] Defendants' Answer to Plaintiff's Interrogatory No. 2(h).

amounts in child labor civil penalties: $151,000 (FY 1976), $650,000 (FY 1977), and $592,000 (FY 1978).[4] In each year, these amounts constituted less than one percent of the total funds appropriated to ESA by Congress.[5] Furthermore, in each of those years, ESA failed to spend the full amount appropriated to it, and the unexpended monies were returned to the Treasury. Indeed, in each of the three years the amounts lapsed to the Treasury substantially exceeded the amounts collected in child labor penalties.[6] In other words, while it is theoretically possible for the challenged provisions of 29 U.S.C. 216(e) and 9a to increase the monies available to ESA in a fiscal year beyond those appropriated to it by Congress, they have never had that effect.

In FY 1976 ESA allotted the amounts collected in child labor penalties to the ESA national office. In FY 1977 ESA allotted the penalties collected to the national office, to the Office of the Solicitor of Labor, and to the several regional offices in proportion to the amounts expended by those offices on child labor enforcement. The Atlanta Regional Office received

[4] Defendant's Answer to Plaintiff's Interrogatory No. 2(a). The fiscal year runs from October 1 to the following September 30. Although Section 16(e) became effective on May 1, 1974, no penalties were collected prior to July 15, 1975.

[5] *Budget of the United States Government, Fiscal Year 1979—Appendix*, pages 623-624; *Budget of the United States Government, Fiscal Year 1978—Appendix*, page 510.

[6] Defendants' Answer to Plaintiff's Interrogatory No. 2(b). In FY 1976, $981,000 lapsed to the Treasury; in FY 1977, $870,000; in FY 1978, approximately $4,600,000.

$39,200.[7] In FY 1978 and FY 1979 ESA has held the penalties collected in the Treasury.[8]

Without disputing these facts, appellee moved for summary judgment, and the district court granted the motion. Relying on *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the court held that the provision of Section 16(e) relating to the use of civil penalties "creates a situation in which bias may creep into the decisions of the regional officials who impose those penalties" (App. B, *infra*, 12a), in violation of the Due Process Clause (*id.* at 13a).

The district court appears to have reasoned that under the reimbursement provision of Section 16(e) an ambitious assistant regional administrator, motivated by a desire to enlarge his bureaucratic domain, would have an incentive to assess a substantial penalty against a child labor violator in the expectation, or hope, that a portion of the penalties collected would be returned to his office. This additional funding, the court apparently believed, would enable the administrator to devote more resources to (and perhaps hire

[7] Defendants' Answer to Plaintiff's Interrogatory No. 2(c). See also App. B, *infra*, 9a n.6. The record does not indicate whether those allotments served to increase the funds that would otherwise have been available to each office for expenditure in that year. Although the Department of Labor's annual appropriation specifies the amount earmarked for ESA, it does not specify the amount given to each of ESA's regional offices.

[8] *Ibid.*

more personnel for) child labor enforcement, which would in turn uncover more violations and generate even larger penalties (see App. B, *infra*, 7a-9a).

The district court acknowledged that the assessment of penalties by the assistant regional administrator is subject to a de novo determination by an administrative law judge, that the Office of Administrative Law Judges receives no allotment of any portion of the child labor penalties, and that there is thus no due process violation at the administrative law judge level (App. B, *infra*, 10a). It nevertheless concluded that that fact did not purge the statutory scheme of the alleged taint, because "unfairness at the 'trial' level cannot be corrected by the existence of appeal procedures, or even by the availability of a trial *de novo*" (*ibid.*).

Finally, although the district court held that it was the reimbursement provision of Section 16(e) alone that rendered the civil penalty statute unfair, and although it stated that it would be "simple and constitutionally sound [to] pay all civil money penalty funds directly into the Treasury of the United States" (App. B, *infra*, 12a), the court did not limit its relief to declaring unconstitutional, and enjoining the enforcement of, the reimbursement provision. Instead, it permanently enjoined appellants "from enforcing section 16(e) * * * against [appellee] * * * and from requiring payment of the civil money penalties assessed against it" (App. A, *infra*, 1a-2a; see also App. B, *infra*, 13a).

THE QUESTIONS ARE SUBSTANTIAL

The district court has held unconstitutional a significant component of a major federal statute protecting the nation's children from exploitation in the labor market.[9] The civil penalty sanctions of Section 16(e) of the Fair Labor Standards Act are an important deterrent to violations of the Act's child labor provisions, and the district court's decision, if not overturned, will seriously impair the effective enforcement of those provisions. That consequence is sufficiently substantial to warrant plenary review by this Court.

Moreover, the district court's decision is incorrect in three respects. First, we submit that the due process standards established in cases such as *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), are applicable only to officials exercising judicial or quasi-judicial functions. The court erred in applying those standards to the initial assessment of penalties by an ESA assistant regional administrator, which is an essentially prosecutive function. This is an important is-

[9] Enforcement of the child labor laws is one of the principal responsibilities of the Employment Standards Administration. In FY 1977 ESA investigations revealed that more than 16,000 children in over 2,000 establishments were illegally employed. United States Department of Labor, *Minimum Wages and Maximum Hours Standards Under the Fair Labor Standards Act: An Economic Effects Study Submitted to Congress*, 28-29 (1978).

This Court's decisions concerning the validity of the federal child labor laws are, of course, landmarks in our constitutional history. *United States* v. *Darby*, 312 U.S. 100 (1941); *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).

sue that has implications beyond the child labor law context. Second, even if the principles announced in *Ward* and *Tumey* are applicable here, the court erred in concluding that the statutory scheme creates a sufficient risk of personal bias to violate due process. The likelihood that a penalty assessment under Section 16(e) will be the product of bias could hardly be more remote and attenuated. Finally, even if the reimbursement provision of the statute creates a sufficient risk of bias to violate due process, the court erred in enjoining enforcement of Section 16(e) in toto. Instead, it should have severed the reimbursement provision from the rest of Section 16(e) and enjoined only the enforcement of that provision.

1. In *Tumey* v. *Ohio*, *supra*, and *Ward* v. *Village of Monroeville*, *supra*, this Court reversed criminal convictions handed down by village mayors sitting as judges of the mayor's court. The Court held that the convictions violated due process because, in *Tumey*, the mayor received a portion of the fines and costs he levied as personal income, and, in *Ward*, the mayor had primary fiscal and executive responsibility for the village, which was dependent on the fines he imposed for nearly half its revenue. Those circumstances, the Court held, created situations "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused * * *." *Tumey* v. *Ohio*, *supra*, 273 U.S.

at 532; *Ward* v. *Village of Monroeville, supra,* 409 U.S. at 60.

Tumey, Ward and other cases in which this due process standard has been applied clearly indicate, we submit, that the standard is applicable only to officials exercising adjudicative functions, which ordinarily entail deciding disputes based on evidence and arguments presented by other adverse parties. Thus, in *Tumey* the Court followed the "general rule" that "officers *acting in a judicial or quasi-judicial capacity* are disqualified by their interest in the controversy to be decided * * *," and it explained the rule in terms of "a possible temptation to the average man *as judge* * * *." 273 U.S. at 522, 532 (emphasis added). And in *Ward,* the Court stated that "[t]he issue turns * * * on whether the Mayor can be regarded as an impartial *judge.*" 409 U.S. at 59 (emphasis added). Similarly, the Court has remarked that these due process principles apply to "administrative agencies *which adjudicate* as well as to courts." *Withrow* v. *Larkin,* 421 U.S. 35, 46 (1975) (emphasis added). See also *Connally* v. *Georgia,* 429 U.S. 245 (1977), invalidating a scheme in which "the defendant is subjected to what surely is judicial action by an officer of a court who has a 'direct, personal, substantial, pecuniary interest' " in the matter (*id.* at 250, quoting from *Tumey* v. *Ohio, supra,* 273 U.S. at 523). See also *Bevan* v. *Krieger,* 289 U.S. 459, 465-466 (1933).

ESA assistant regional administrators are not adjudicators, and in assessing child labor penalties

in the first instance they are not acting in a judicial or quasi-judicial capacity. Rather, they are exercising what is in effect a prosecutive function; their action is no different in substance than a government attorney's determination of what charges to bring in an indictment or what relief to seek in a civil complaint.

Adjudication comes after assessment, not before. An employer who disputes an assessment is entitled to a de novo hearing before an impartial administrative law judge. It is the latter who adjudicates the dispute in a proceeding in which the assistant regional administrator acts as the complaining party. Indeed, the fact that the assistant regional administrator's role is essentially prosecutive and not adjudicative is emphasized by the Secretary's regulations, which state that the notice of penalty assessment and the exceptions filed to it "shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding" (29 C.F.R. 580.3(b)) and provide that the burden of proof shall be upon the Secretary (or his delegate) (29 C.F.R. 580.21(a)).

The district court recognized that the hearing before an administrative law judge fully satisfies the requirements of due process, because the reimbursement provision of Section 16(e) has no possible effect on the Office of Administrative Law Judges (App. B, *infra,* 10a). It concluded, nevertheless, that fairness at the administrative law judge level did not cure what it viewed as impermissible bias at the

assessment stage, and it relied on this Court's holding in *Ward* that the absence of a neutral and detached judge at the first level of adjudication could not be remedied bv the availability of a second, de novo, level of adjudication (*ibid.*). See 409 U.S. at 61-62. But this principle has no application to the assessment process which, as we have already noted, is not a level of adjudication at all.[10]

Thus, to the extent that the district court's decision was based on its view that the initial penalty assessment is equivalent or comparable to an adjudication at the first, or "trial," level, the court misconceived the statutory scheme. To the extent that the decision may have been based on the court's view that the due process standards established in *Ward* and *Tumey*

[10] The fact that Section 16(e) provides that the initial penalty assessment by the Secretary's delegate "shall be final" unless the employer files exceptions to it is not significant in determining whether the assessment is a judicial function. Under the statutory scheme, an employer's failure to file exceptions constitutes a consent to the assessment and is no different than a defendant's failure to contest civil or criminal charges filed in court by a prosecutor or plaintiff. Indeed, in *Ward*, this Court recognized that, even with respect to officials exercising clearly judicial functions, there may be an important distinction between the determination of undisputed charges and adjudication of those same charges in a contested case. The Court there stressed that the question presented concerned "the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where he elects to contest the charges against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official * * * to accept a free and voluntary plea of guilty * * * or the like." 409 U.S. at 62 n.2.

are applicable to non-judicial, prosecutive functions, we submit that the Court erred as a matter of law. Furthermore, the latter view, if accepted, would have significant implications beyond the context of this case.

Officials exercising prosecutorial functions, whether at the administrative or judicial level, are not and should not be expected to be totally "neutral and detached judge[s]" of their own cases. *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 62. This Court has often recognized that prosecutors must have broad discretion in framing charges and requesting remedies (see, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978)), and in doing so they may often be motivated by the kind of general ambition that the district court believed to be impermissibly fostered by the reimbursement provision of Section 16(e). Although there unquestionably are constitutional limits to the discretion and partisanship of prosecutors, our adversary system presumes that government attorneys have at least some interest in the success of their cases, and certainly have an interest greater than those responsible for adjudicating the cases. See *Withrow* v. *Larkin*, *supra*, 421 U.S. at 51-53. A holding that the standards of impartiality that this Court has applied to officials exercising judicial functions must apply equally to those exercising prosecutive functions would be incompatible with the very nature of our system.

2. Even if the standards announced in *Tumey* and *Ward* are applicable to the civil penalty assessment

stage, the district court misapplied them. The due process determination turns upon whether the alleged influencing factor is sufficiently proximate and substantial to create a significant risk of bias. That risk is insignificant here.

Dugan v. *Ohio*, 277 U.S. 61 (1928), which this Court distinguished in *Ward* (409 U.S. at 60-61), illustrates the point. In *Dugan*, the Court upheld a mayor's court conviction against a due process challenge. As in *Ward*, the fine imposed by the mayor in *Dugan* accrued directly to the city treasury. But, unlike in *Ward* or *Tumey*, where the mayor had "wide executive powers," the mayor in *Dugan* had "no executive, and exercised only judicial, functions." *Dugan* v. *Ohio*, *supra*, 277 U.S. at 63. The city manager, not the mayor, was the "active executive"; the mayor was simply one member of a five-person commission that exercised all legislative and, together with the city manager, all executive powers. Moreover, although the mayor's salary was "paid out of a fund to which fines accumulated from his court * * * contribute, it is a general fund, and he receives his salary in any event, whether he convicts or acquits." *Id.* at 65. In these circumstances, the Court held that the mayor's relationship to the city's "executive or financial policy" was too "remote" to impute bias to him in his capacity as judge. *Ibid.* See also *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 61.[11]

[11] Similarly, in *Bevan* v. *Krieger*, *supra*, the Court upheld a state statute that authorized a notary public to imprison for contempt any witness who refused to testify at a deposition. The statute was challenged on the ground that the notary, who was paid for the testimony he transcribed, had a personal interest in compelling testimony, but the Court rejected the claim, holding that the notary's possible interest was "too remote and incidental to vitiate his official action." 289 U.S. at 466. With particular significance to this case, the Court also observed (*ibid.*): "Moreover [the notary's] action lacks the finality which attached to the judgment in the *Tumey* case, as it is subject to review [under the state statute]."

Although the district court correctly recognized that "the crucial consideration is the remoteness of the pecuniary interest" (App. B, *infra*, 6a), it erred in striking down the civil penalty statute. The risk of bias created by the reimbursement provision of Section 16(e) is substantially less than that involved in *Tumey* and *Ward*, and, indeed, is considerably more remote than the danger of prejudice held to be constitutionally insignificant in *Dugan*.

Unlike in *Tumey*, no ESA official has a personal financial stake in his decision. See also *Connally* v. *Georgia*, *supra*; *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973). There is no allegation that sums collected as civil penalties increase the salaries of the administrators who assess them. In addition, unlike in *Ward*, there is no realistic possibility that an official's "executive responsibilities" (409 U.S. at 60) would influence his judgment in assessing penalties. Assistant regional administrators have no budgetary functions; the penalties recovered do not accrue directly to their offices, but rather are paid into a fund at ESA's national office in Washington, which determines whether and how to use them; and these sums constitute a minute fraction—less than one percent—

of ESA's national budget. In fact, as noted above, far from being fiscally dependent upon receipt of the penalties, ESA has each year lapsed unobligated funds to the Treasury in amounts greater than it has collected as civil penalties. See page 7 and note 6, *supra*. As in *Dugan*, then, the official's "relationship to the finances and financial policy" of the body that receives the funds is "too remote to warrant a presumption of bias." *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 60-61.

Indeed, even if an assistant regional administrator were aware of the reimbursement provision of Section 16(e), it is difficult to imagine how the statute would be likely to influence the level of penalties he decides to assess. Under the statutory scheme, when ESA allocates child penalty funds to its regional offices—and it has done so in only one year since Section 16(a) was enacted (see page 7, *supra*)—it does so in proportion not to the level of penalties initially assessed by those offices but to the amount of money expended in investigating and prosecuting child labor violations. Thus, the decision to assess a heavy penalty could not increase the allocation to the assessing official's office. It is perhaps conceivable that an assistant regional administrator would decide to expend more resources (*e.g.*, by hiring more investigators) than his own budget would otherwise permit in the hope that those expenditures would be funded by allocations from the monies recovered as a result of his own penalty assessments. But any such possibility rests on a series of increas-

ingly improbable assumptions,[12] and it falls far short of creating the substantial risk of personal bias that violates the Due Process Clause.

3. Assuming that the reimbursement provision of Section 16(e) is unconstitutional, the district court should have severed that provision and given effect to the remainder of the statute. The reimbursement provision is but an incidental part of Section 16(e), whose basic purpose and effect is to subject child labor violators to civil penalties. Yet the court's order declares the statute unconstitutional in its entirety and permanently enjoins its enforcement against appellee (App. A, *infra*, 1a-2a).

This decision conflicts with the settled rule that:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

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[12] This possibility, which the district court apparently believed was significant, would require the assumptions that the assistant regional administrator would be authorized by Congress to increase the size of his staff, that the administrator's superiors would permit him to increase child labor enforcement expenditures significantly in excess of his budget; that the regional office's pro rata portion of the aggregate penalty fund would be sufficient to cover those expenditures but would not be sufficient in the absence of that office's contributions to the fund; that the increased expenditures would uncover a correspondingly increased number of violations; that the administrative law judges would concur with the official's biased penalty assessments; and that ESA budget officers would decide in that year to allocate penalty funds to the regional offices.

Champlin Refining Co. v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). See also *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). Here, it is apparent that the reimbursement provision is severable from the remainder of the statute and that what remains is "fully operative as a law." Moreover, there is strong evidence that Congress would have enacted Section 16(e) without the reimbursement provision rather than have no civil penalty enforcement system at all.

First, Congress has expressed its intent by including a broad severability clause in the Fair Labor Standards Act. See 29 U.S.C. 219.[13] As this Court has remarked with respect to a similar clause: "Congress has thus said that * * * when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced." *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938).

Second, the legislative history of Section 16(e), although not extensive, makes clear that the dominant, if not exclusive, purpose of the section is to strengthen enforcement of the child labor laws. The reimbursement provision contributes little if anything to the achievement of that goal; indeed, the legislative history contains no reference to that provision at all. See S. Rep. No. 93-690, 93d Cong., 2d Sess. 29 (1974); 119 Cong. Rec. 14453 (1973) (remarks of Senator Dominick).

[13] That section provides:

> If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Finally, Congress has not included a similar reimbursement provision in analogous civil penalty statutes, such as the Occupational Safety and Health Act (29 U.S.C. 667(k)) or the Coal Mine Health and Safety Act (30 U.S.C. 819(a)). In these circumstances, we submit that it is exceedingly improbable that Congress would have declined to enact the civil penalty provisions in the absence of the reimbursement clause.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
Assistant to the Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

RONALD G. WHITING
Associate Solicitor

LOIS G. WILLIAMS
JOSEPH M. WOODWARD
Attorneys

AUGUST 1979

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

JERRICO, INC., PLAINTIFF

v.

U. S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

ORDER

Upon consideration of plaintiff's motion for summary judgment, the memoranda filed in support thereof and opposition thereto, argument of counsel in open Court, and for the reasons set forth in the Court's Memorandum issued this day, and it appearing to the Court that there are no genuine issues of material fact, it is by the Court this 7th day of May, 1979,

ORDERED that plaintiff's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED and DECLARED that section 16(e) of the Fair Labor Standards Act, 29 U.S.C. § 216 (e) (1976), violates the due process clause of the fifth amendment to the United States Constitution; and it is further

ORDERED that defendants be, and hereby are, enjoined from enforcing section 16(e) of the Fair

Labor Standards Act, 29 U.S.C. § 216(e) (1976), against plaintiff and are further enjoined from requiring the payment of civil money penalties assessed against plaintiff.

/s/ Oliver Gasch
Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

JERRICO, INC., PLAINTIFF

v.

U. S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

MEMORANDUM

The plaintiff in this action challenges the constitutionality of a provision of the Fair Labor Standards Act (FLSA). It alleges that section 16(e) of the FLSA, 29 U.S.C. § 216(e) (1976), violates due process by mandating the use of civil money penalties collected for violations of the child labor laws as reimbursement for the cost of enforcing the child labor law. Plaintiff contends that the statutory scheme which permits penalties received to be deposited to the credit of the division of the Department of Labor which supervised the assessment of the penalties creates an impermissible potential for bias. On May 24, 1978, this Court denied defendants' motion to dismiss. After the close of discovery, plaintiff moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants have opposed the motion on the basis that there exist genuine issues of material fact and that plaintiff as a matter of law is not entitled to judgment.

Oral argument on plaintiff's motion was heard by this Court March 19, 1979.

BACKGROUND

Plaintiff is a Delaware corporation engaged in operating restaurants throughout the southeastern United States. The Department of Labor investigated several of plaintiff's restaurants prior to 1975, and discovered various violations of the child labor provisions of the FLSA, of which plaintiff was duly notified. These discoveries led to a chain-wide investigation of plaintiff's restaurants in 1975. The investigation revealed that 169 minors had been or were then currently employed by plaintiff. The Assistant Regional Administrator for the Employment Standards Administration, Wage and Hour Division of the Department of Labor, assessed civil money penalties in the amount of $103,000 against plaintiff, pursuant to section 16(e) of the FLSA.

Plaintiff filed an exception to the determination of the violations, and a hearing was held on January 18 and 19, 1977, in Lexington, Kentucky. The administrative law judge concluded that the existence of the violations was clearly established, but he reduced the amount of penalties assessed from $103,000 to $18,500 on October 5, 1977. Plaintiff then filed this action on January 25, 1978, not as an appeal from the order of the administrative law judge, but solely as a challenge to the facial constitutionality of section 16(e).

MERITS

Section 16(e) provides for assessment of civil money penalties under the child labor laws, and further provides that:

> Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with [29 U.S.C. § 9a].

29 U.S.C. § 216(e) (1976). The statute referred to, section 9a, provides:

> All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States.

Plaintiff argues that these provisions create a situation in which the average person would possibly be tempted to impose civil penalties, and to impose higher penalties.

The due process test in circumstances such as are alleged here was established by the Supreme Court in *Tumey* v. *Ohio*, 273 U.S. 510 (1927). In *Tumey*, v. *Ohio*, 273 U.S. 510 (1927). In *Tumey*, the mayor of a village in Ohio was empowered to assess fines

in the mayor's court. The mayor then received additions to his salary based on the amount of fines and costs imposed on those convicted in his court. *Id.* at 520. The Court held that this procedure violated due process because the situation was one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused. . . ." *Id.* at 532. In *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the Supreme Court invalidated a statutory scheme under which a mayor who also acted as judge levied fines that were paid into the village treasury. The mayor did not receive any part of his salary from the fines, but was responsible for the conducting and financing of village affairs. The Court found that this relationship would have the tendency to make the mayor partisan to maintain the high level of contributions from the mayor's court. *Id.* at 60. This due process test, moreover, applies with equal force to administrative proceedings. K. Davis, Administrative Law Treatise § 12.04 at 250 (1958).

Reflection on the due process analysis used by the Supreme Court in *Ward* and *Tumey* suggests that the crucial consideration is the remoteness of the pecuniary interest alleged to be the biasing influence. For example, in *Dugan* v. *Ohio*, 277 U.S. 61 (1928), the Supreme Court held that due process was satisfied in circumstances in which the mayor of a village had only limited executive duties, even though he had

the power to convict and impose fines for the possession of liquor. The mayor was a member of the city commission which fixed his salary, but he had no vote in the matter. The Court found that the mayor's relationship to the finances and financial policy of the village was too remote to warrant a presumption of bias in the mayor's role as judge. *Id.* at 65. In *Aiello* v. *Wilmington*, 426 F. Supp. 1272 (D. Del. 1976), the court found allegations that the Bureau of Fire's Trial Board had a pecuniary interest in penalizing firemen for infractions too attenuated as a matter of law to fall within the purview of *Ward*. The Trial Board would assess "penalty hours" against errant firemen, which they were required to work off without pay. The court rejected plaintiff's claim that the Trial Board had a direct interest in assessing penalty hours in that only by receiving such "free labor" could the Bureau of Fire stay within its budget. *Id.* at 1292.

The Department of Labor, under the statutes challenged in this action, allocates and distributes funds collected as civil money penalties to various bureaus, offices, services, and divisions for the purpose of reimbursement of child labor obligated funds.[1] The allotments are distributed pro rata based on total obligations incurred in connection with enforcement of the child labor laws.[2] Although the regional of-

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[1] Defendants' Answers to Plaintiff's Interrogatories, No. 2(d).

[2] *Id.* No funds were distributed in fiscal year 1978 or to date in 1979. *See* Defendants' Answers to Plaintiff's Interrogatories, No. 2(c); note 6 *infra*.

fices are not reimbursed in amounts related to the amount of penalties assessed by those offices,[3] they are reimbursed in amounts related to the actual costs of work performed, including salaries and apportioned overhead of the offices.[4] Costs of enforcing the child labor laws, *e.g.*, investigations and ultimately penalty assessments, are, of course, directly related to the amounts assessed in penalties. Greater effort in uncovering violations and fining the violators leads to a greater amount of penalties assessed. Thus, the increased costs of such effort leads to the crediting of a larger share of reimbursements. The Court is persuaded that this direct and tangible relationship between reimbursement and assessment is violative of due process.

The pro rata crediting of sums received as penalties by the Department of Labor to the various bureaus and regional offices charged with imposing those penalties tends to make those offices partisan to maintain a high level of penalty assessment. Clear evidence of this potential biasing effect is the assessment at the regional level of civil money penalties against plaintiff in excess of $100,000. The Assistant Regional Administrator imposed a fine which was nearly the maximum that could have been im-

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[3] Defendants' Answers to Plaintiff's Interrogatories, No. 2(g).

[4] *See* Defendants' Answers to Plaintiff's Interrogatories, No. 2(e).

posed under the statute.[5] For fiscal 1977, the year following the initial imposition of penalties in this case, the regional office in Atlanta, which had jurisdiction over plaintiff, was allotted $39,200 as its pro rata share of total penalty funds received.[6] The propensity of this relationship between assesment and allotment of penalties to create an atmosphere that permits less than objective balancing of alleged violations against proposed penalties does not comport with the notions of fairness inherent in due process of law.

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[5] Section 16(e) provides a maximum penalty of $1,000 for each violation of section 212 of the same title. 29 U.S.C. § 216(e) (1976).

[6] Defendants' Answers to Plaintiff's Interrogatories, No. 2(c), sets out the disbursement of penalty funds:

Date	Funds Allotted	Distribution
Transition Qtr.	$ 82,578	
6/8/76	47,886	
6/28/76	16,735	
Total FY 1976	$147,199	National Office—W-H
FY 1977	$194,800	National Office—W-H
	5,700	Boston—W-H, Reg. Ofc.
	10,800	New York—W-H, Reg. Ofc.
	11,900	Phila.—W-H, Reg. Ofc.
	39,200	Atlanta—W-H, Reg. Ofc.
	44,300	Chicago—W-H, Reg. Ofc.
	21,300	Dallas—W-H, Reg. Ofc.
	9,000	Kansas City—W-H, Reg. Ofc.
	4,900	Denver—W-H, Reg. Ofc.
	12,400	San Fran.—W-H, Reg. Ofc.
	5,500	Seattle—W-H, Reg. Ofc.
	200,000	Solicitors Office (SOL)
Total FY 1977	$559,800	
FY 1978	—	Held in Treasury
FY 1979	—	Held in Treasury

Defendants maintain that there is no possible biasing influence on the administrative law judges who hear child labor cases and are empowered to determine whether the amount of penalties assessed by the regional officer was correct. Defendants observe that the Office of Administrative Law Judges hears cases arising under approximately 55 statutes, with child labor cases representing approximately 1.3% of the total number of cases docketed under those statutes.[7] Moroever, no administrative law judge has been hired solely for the purpose of hearing child labor cases,[8] and the Office of Administrative Law Judges receives no pro rata allotment of the total amount of civil money penalties imposed. Thus, the interest of an administrative law judge in assessing or affirming the imposition of penalties is too remote to warrant the conclusion that due process requirements are not met at the administrative law judge level.

The absence of due process infirmities in child labor proceedings before the administrative law judge, however, does not vitiate the conclusion that the statutory scheme at issue is itself violative of due process. The Supreme Court has firmly established that unfairness at the "trial" level cannot be corrected by the existence of appeal procedures, or even by the availability of a trial *de novo*. *Ward*, *supra*, at 61. The Court emphasized that a party "is entitled to a neutral and detached judge in the first instance." *Id.* at 61-62. Since civil money penalties are assessed in the first instance by regional officials whose office is subsequently allotted a portion of penalties received, plaintiff in this case did not receive in the first instance access to a "neutral and detached judge." Without providing fundamental fairness at the most basic level of dispute resolution, the statute under which plaintiff was eventually required to pay fines cannot meet the constitutional requirements established by *Ward* and *Tumey*. The interest of regional officials is not so remote as that discussed in *Aiello*, *supra*, and *Dugan*, *supra*. The relationship between assessment of penalties and allotment of funds is direct, clear, and creates an impermissible potential for bias in the initial decision-making process.

Section 16(e) is unique in the constellation of federal statutory procedures. No other statute provides for the crediting to enforcing agencies of civil money penalties assessed against violators. Most such penalties are paid directly into the Treasury of the United States. *E.g.*, The Occupational Safety and Health Act, 29 U.S.C. § 666(k) (1976).[9] Some funds are specifically designated for a particular purpose. *E.g.*, The Water Quality Improvement Act of 1970, 33 U.S.C. § 1321(k) (1976) (established a revolving fund into which fines received are deposited to defray the cost of oil removal resulting

[7] Defendants' Answers to Plaintiff's Interrogatories, No. 3.

[8] Defendants' Answers to Palintiff's Interrogatories, No. 4.

[9] *See* Defendants' Opposition to Motion for Summary Judgment, at 20.

from oil spills). Section 16(e), in contrast, mandates the designation of fines received to the office charged with imposing the fines, in relation to the costs of enforcing the child labor laws. This statutory anomaly is the result of the incorporation in section 16(e) of a provision requiring the repayment to the Department of Labor of the "actual cost" of statistical studies conducted for private parties. *See* 29 U.S.C. § 9 (1976). Monies received as reimbursement for such costs are to be used to defray the ordinary expenses of the agency. *Id.* § 9a. This procedure is perfectly suitable to the context for which it was originally enacted, that is, the conducting of studies by the Department of Labor, which has greater resources and capacity to conduct such studies than most private entities. The transplanting of such a scheme, however, to the context of assessment of civil money penalties, which involves important rights of alleged violators of the child labor laws, creates a situation in which bias may creep into the decisions of the regional officials who impose those penalties. Thus, the peculiar statutory format of section 16(e) unconstitutionally deprives plaintiff and others of due process. The more appropriate procedure is simple and constitutionally sound: pay all civil money penalty funds directly into the Treasury of the United States. To allow only the Department of Labor to deviate from such a clear procedural alternative, to the detriment of alleged violators, would be to disregard the fundamental tenets of our legal system.

In short, in view of the indisputably impermissible biasing influence created by section 16(e) of the FLSA, this Court is constrained to declare that section 16(e) violates the due process clause of the fifth amendment. Accordingly, defendants will be permanently enjoined from enforcing section 16(e) against plaintiff and from requiring payment of the civil money penalties assessed against it.

/s/ Oliver Gasch
Judge

Date: May 7th 1979

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

JERRICO, INC., PLAINTIFF

v.

U. S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the Defendants in the above captioned case hereby appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1252, from the final judgment declaring Section 16(e) of the Fair Labor Standards Act (29 USC 216(e)) unconstitutional entered on May 7, 1979.

Dated this 17th day of May, 1979.

CARIN ANN CLAUSS
Solicitor of Labor

RONALD G. WHITING
Associate Solicitor
General Legal Services

PAUL E. MYERSON
Counsel for Employment
Standards

MARCIA A. LURENSKY
Attorney

By: /s/ Marcia A. Lurensky
United States Department
of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing NOTICE OF APPEAL was mailed on this 17th day of May, 1979 to Thomas W. Power, Attorney for Plaintiff, 1666 K Street, N.W., Suite 611, Washington, D.C. 20006.

/s/ Marcia Lurensky
MARCIA LURENSKY
U. S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Telephone: (202) 523-8244

APPENDIX D

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGE
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-CL-105

[SEAL]

IN THE MATTER OF:

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, PLAINTIFF

v.

JERRICO, INC., RESPONDENT

ROBERT C. HAYNES, ESQUIRE
Office of the Solicitor
U.S. Department of Labor
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Nashville, Tennessee 37203

ELIZABETH S. BONFILS, ESQUIRE
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For the Plaintiff,

THOMAS W. POWER, ESQUIRE
Robert D. McDonald, Esq.
1666 K Street, N.W.
Suite 611
Washington, D.C. 20006

CURTIS L. WILSON, ESQUIRE
Jerrico, Inc.
1949 Nicholasville Road
Lexington, Kentucky 40503
For the Respondent.

Before: PETER MCC. GIESEY
Administrative Law Judge

DECISION AND ORDER

This is a proceeding brought under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, *et seq.* (hereafter "the Act")[1] and Regulations pro-

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[1] Specifically, section 216(e);

(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

(1) deducted from any sums owing by the United States to the person charged.

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which

mulgated by the Secretary of Labor pursuant to authority under the Act.

A hearing was held on January 18 and 19, 1977 in Lexington, Kentucky. Briefly, the record shows the following.

Statement of the Case

The facts are undisputed unless otherwise indicated.

Jerrico, Inc. is engaged in the business of establishing, managing and operating restaurants. The annual gross volume of business during the relevant period herein (1974 and 1975) exceeded $250,000 yearly. Jurisdiction under the Act is not in issue.

Among the restaurants operated by Jerrico, Inc. are 39 or 40 enterprises trading as "Jerry's, located in Kentucky, Indiana, Tennessee, Georgia and Florida.

In 1969, an investigation of "Jerry's," Harrodsburg road, Lexington, by a Department of Labor

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the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, United States Code and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes" (29 U.S.C. 9a).

compliance officer disclosed that a 15 year old waitress had worked later than 7 p.m. in violation of Child Labor Regulation number 3.[2] The compliance officer testified that he delivered a notice (form 103) to the corporation controller.

In June, 1971, a one page summary of Regulation number 3, on corporate letterhead paper, was circulated to restaurant managers.

In July, 1973, following an investigation at a restaurant known as "Jerry's #7" in Lexington, Kentucky, the investigating officer notified the manager that four busboys under the age of 16 had worked after 7 p.m. in violation of Regulation number 3. The manager testified that within two weeks of this notice, he received "a memo from the main office to comply with the law or get out."

Following an investigation of "Jerry's #2" in Lexington, a compliance officer notified a corporate

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[2] 29 C.F.R. 570.35(a), *viz.*;

. . . [employment of minor employees between 14 and 16 years of age] shall be confined to the following periods:

(1) Outside school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer . . . when the evening hour will be 9 p.m.

* * *

vice president, in December, 1974, of the fact that two waitresses at that restaurant had worked later than 7 p.m. in violation of Regulation number 3.[3]

Following an investigation of 5 or 6 of respondent's restaurants, in March, 1975, the investigating officer notified respondent's regional manager that two employees under the age of 16 were employed in the kitchens of two restaurants in Shelbyville, Kentucky, in violation of Regulation number 3.[4]

In June, 1975, a compliance officer went to Jerrico's home office in Lexington to investigate two restaurants. Finding violations of the child labor regulations, he determined that the investigation should be broadened to include all of the "Jerry's" restaurants in the five state area mentioned, *supra*. The

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[3] The corporate officer testified that he could not recall the occasion.

[4] 29 C.F.R. 570.34(b)

* * *

Paragraph (a) of this section [permitted occupations] shall not be construed to permit the application of this subsection to . . . the following occupations in . . . food service . . . establishments.

* * *

(5) Cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking.

* * *

Although the compliance officer who conducted this investigation testified, he did not state whether these violations involved prohibited hours or prohibited occupations. The form 103's identify the violations only as "CL Reg. 3."

investigation covered employment during the two year period from June, 1973 to June, 1975. On August 1, 1975, the compliance officer notified corporate counsel that the investigation disclosed that 169 minors had been, or were presently, employed by respondent in violation of the child labor provisions of the Act.

Briefly, the violations consisted of:

1. Employment of 7 persons under the age of 14.
2. Employment of 162 persons under the age of 16 for periods and at hours forbidden by Regulation number 3.
3. Employment of two of the above 162 persons in occupations not permitted by Regulation number 3.

In due course a penalty was assessed against respondent. The assistant regional administrator calculated the penalties, giving consideration to factors set forth in section 216(e) of the Act and Regulations (29 C.F.R. 579.5) promulgated by the Secretary for such purpose.

The penalties were as follows:

Violation 1	$ 2,100
Violation 2	16,200
Violation 3	200

added to this amount was the sum of $84,500, representing $500 for each of the 169 persons employed for periods and under conditions similar to those

found in previous investigations of respondent's restaurants.[5]

At the hearing, respondent's corporate officers who testified professed ignorance of violations of the child labor section of the Act earlier than those of which they were notified following the latest investigation.

Nevertheless, it is undisputed that, within the year following notification of a corporate officer (who did not testify) of the violations which occurred in 1969, some responsible officer at respondent's corporate headquarters circulated a summary of the Act's child labor requirements to restaurant managers. The manager of a restaurant at which violations were discovered in 1973 received a memo "from the main office" shortly after the conclusion of the investigation advising him "to comply with the law or get out."

Respondent's vice president testified that it was "very difficult to effect compliance with the law," explaining that at 6:30 and 9:00 p.m., "the restaurant is going 120 percent" because this is the dinner hour. According to the witness, "a manager under pressure is not going to tell a [minor] to go home."

He also explained that violations of this nature were not as obvious at the corporate headquarters as

[5] 29 C.F.R. 579.5(c), *viz.*;

> In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity the violation or violations, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations.

the testimony of one of plaintiff's witnesses suggested. Thus, although employee's time cards bear, *inter alia*, their dates of birth, the timecard is not submitted to headquarters until a week after the payroll has been prepared because each restaurant manager submits a weekly "computer sheet" from information on the timecards, which compilation serves as the payroll source.

Respondent's general counsel testified that the workforce turnover during the two years covered by the investigation was in excess of 8,500 persons and that the turnover from 1969 to 1975 was in excess of 13,500 employees. He also testified that when he was informed, following the 1975 investigation, that 169 violations had been discovered, he realized that "there was a problem in all the stores" that the difficulty was "chain wide." In consequence, he recommended that company policy be changed and that management announce to the restaurant managers that no persons under the age of 16 would henceforth be hired and that currently employed persons under that age be discharged. His recommendations was accepted and the policy was announced in July, 1975. He stated that an additional consequence of the discovery of "chain-wide" violations was the discharge of "2 or 3" restaurant managers.

Findings of fact and Conclusions of Law

Having considered the entire record, including the testimony, exhibits and briefs, and having observed the demeanor of the witnesses, I make the following

findings of fact, conclusions of law and decision and order based thereon.

Jurisdiction is not in dispute.

The facts are set forth, *supra.*

Concerning the disputed question of notice to respondent of violations of child labor Regulations in 1969, 1973, 1974 and 1975, I credit the testimony of the solicitor's witnesses, and find that in each case a responsible agent of respondent was timely notified. That is not to say that I believe respondent's witnesses testified falsely. Rather, I believe that their memories were less precise and that a significant circumstance in this matter is directly related to the substance of such testimony and the reasons therefor.

Thus, the record demonstrates that the earlier violations were regarded by responsible management as isolated, unusual and easily corrected by a combination of education—the 1971 memorandum summarizing requirements—and straightforward exercise of management prerogative—the 1973 direction to the manager of "Jerry's #7" to "comply with the law or get out." I credit respondent's witness' testimony that it was not until notification of the wide-spread violations upon which the instant proceedings are based, that management realized that the problems were "serious" and "chain-wide." Whether management's immediate action to eliminate the circumstances which underlay the violations and discipline some of the responsible restaurant managers was motivated by a desire to avoid the threatened imposi-

tion of a significant money penalty or a public spirited impulse to abide by the Act is of no consequence. The immediate and far-reaching actions taken are, if not probative, at least corroborative of respondent's officials protestations that they sincerely believed that necessary and reasonable corrective action had long since been taken and that violations which had been minor and infrequent in the past had ceased as a result of measures reasonably calculated to correct the underlying causes.

Another circumstances which I perceive to have been afforded greater weight than warranted was the presence of a birth date on each timecard examined by the compliance officer. Thus, asked when he reached the conclusion that the violations were willful, he replied, ". . . when I saw the extent [and] nature . . . and I saw that here we had violations on the face of the record and we had 20 at [a] time . . . and the indication of the violations were contained in the date of birth and the information [was] available on the time cards [,] the Employer had knowledge . . . ." Plainly, he assumed that each week some agent of respondent, in making up the payroll, read or could have read information showing that the employee was a minor and at the same time calculated a pay check representing what could not be mistaken for anything but payment for working an unlawful number of hours or hours during which employment was prohibited or both. The record shows, however, that this was not the case. Rather, the payroll was prepared from "computer sheets"

and the time cards, which did indeed show violations on their face, were submitted a week later only to serve as base records consulted in the event of erroneous calculations or other circumstances requiring the checking of bases for events (payment) which had already occurred.

These circumstances are not exculpatory. Nevertheless, they explain the circumstances underlying the assessing officer's conclusion that the violations were repeated and willful. Accordingly, to the extent that the judgment concerning willfulness rests upon these matters, I must disagree.

What the record reveals is a course of violations, first disclosed in the 1969 investigation. From that time until the disclosure of "chain-wide" violations in the instant case, management had no reason to believe that corrective actions taken were ineffective. With the exception of the 1971 memorandum corrective action was selectively directed to what management reasonably believed to be isolated instances of violations of the child labor regulations. I do not question the Secretary's assertion that management could have discovered his continuous and wide-spread course of conduct engaged in by its managers. Perhaps the record discloses evidence of poor management. If so, it is not so poor as to become "willful." I am unwilling to base a determination in a mixed matter of fact and law upon business judgment in a field in which neither I nor the Secretary possess expertise. It begs the question to assert that it need not be proved that respondent had evil intent. It must

be shown that respondent knew of the violations or should have known of the violations by the exercise of reasonable care. The record shows that, before learning that the violations were "chain-wide," respondent took steps reasonably calculated to stop current violations and prevent further abuse. Similarly, learning of the extent of violations in 1975, it took swift and appropriate action. In short, I find that the Secretary has not established a record upon which to base a reasonable determination that the violations were willful or that Jerrico's management failed to to take reasonable precautions to avoid violations.

That the violations occurred is undisputed. Respondent's responsibility cannot be disputed. Nor can respondent dispute the fact that at the time of the violations, the statute provided that "[a]ny person who violates the provisions . . . relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty not to exceed $1,000 for each such violation." In these circumstances, it does not lie in respondent's mouth to assert that because the violations occurred before the Secretary promulgated guidelines for the determination of the amounts of penalties, no penalties may be assessed. Ironically, the guidelines complained of served to reduce the penalty assessed below that authorized by the statute. Nor were the regulations applied retroactively. In the process of administering the Act, the last process is the assessment of the penalty. The process was accomplished after the effective date of the regulations. The position of respondent that it

is somehow prejudiced by having been penalized in an amount less than the $169,000 which reading the statute would have disclosed was its maximum exposure when the violations occurred is sound in neither law nor logic.

Finally, respondent has failed to show that the elements considered by the Secretary and the methods employed in arriving at the amount of the penalty were in any way unreasonable or arbitrary.

ORDER

I affirm the determination of the Secretary that the violations for which a penalty was assessed did occur.

Jerrico, Inc. shall pay forthwith, in accordance with the Act and regulations thereunder, a penalty in the amount of $18,500.

/s/ P. McC. Giesey
PETER McC. GIESEY
Administrative Law Judge

Dated: October 5, 1977
Washington, D.C.

RETURN OF SERVICE

I hereby certify that a duplicate/original of the within *DECISION AND ORDER* was sent by certified mail to the person named herein on ————————.

————————————
(Name of Person making service)

————————————
(Official title)

CERTIFIED MAIL

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Curtis L. Wilson, Esquire
Jerrico, Inc.
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Lexington, Kentucky 40503

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 298570 49

Supreme Court, U. S.
FILED
JAN 10 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
Appellants

—*v.*—

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT FILED AUGUST 15, 1979
PROBABLE JURISDICTION NOTED NOVEMBER 13, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
Appellants

—*v.*—

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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* The following appear in the appendix to the Jurisdictional Statement and have not been reprinted:

Order granting summary judgment (J.S. App. 1a); Memorandum Opinion of the district court (J.S. App. 3a); and Notice of Appeal (J.S. App. 14a).

Docket No. 78-0128

JERRICO, INC.
PLAINTIFF

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.
DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1978	
Jan 25	COMPLAINT; Appearance.
Jan 25	SUMMONS (7) and copies (7) of complaint issued; U.S. Atty. serv. 1-26-78; defts. #1,2,3,4 serv. 1-30-78; #5 serv. 1-31-78;
Mar 27	MOTION of defts. for extension of time to respond to complaint; c/m. Appearance of Paul E. Myerson.
Mar 31	ORDER filed 3-30-78 granting motion of deft. to & until April 6, 1978 to answer complaint. (N) GASCH, J.
Apr 3	MOTION of defts. to dismiss; statement of P&A's; attachments (4); c/m 4-3-78. Appearance of Paul E. Myerson.
Apr 17	OPPOSITION of pltf. to defts. motion to dismiss; statement of P&A's.
Apr 27	INTERROGATORIES of pltf. to defts. (First Set).
May 11	MOTION by defts. for enlargement of time for responding to interrogatories (first set) of pltf.
May 16	ORDER filed on 5-12-78 granting motion of defts extension of time of 90 days to answer pltfs. interrogatories pending Court's determination of defts. pending motion to dismiss complaint. (N) Gasch, J.

DATE	PROCEEDINGS

May 18 MOTION of defts. to dismiss complaint heard, argued and taken under advisement. (Rep: J. Moore) Gasch, J.

May 25 MEMORANDUM of the Court filed on 5-24-78. (N) Gasch, J.

May 25 ORDER filed on 5-24-78 denying motion of defts. to dismiss complaint. (N) Gasch, J.

May 26 ANSWER by defts. to the complaint.

May 26 CALENDARED.

Aug 7 MOTION of defts. for enlargement of time to 10-23-78 for responding to pltfs. interrogatories (first set).

Aug 10 ORDER filed 8-8-78 extending defts. time to and including 10-23-78 to respond to pltfs. first set of interrogatories. (N) Hart, J.

Oct 23 ANSWERS of federal defts. to pltfs. first set of interrogatories; exhibits A-D.

Dec 04 CALENDAR CALL, action to be set for cross-motions for summary judgment sometime in the middle of January, 1979. (Rep: Joan Blair) GASCH, J.

1979

Jan 15 MOTION of pltf. for summary judgment; statement of P&A's; table of contents; table of cases and authorities; statement of material facts.

Feb 5 STATEMENT by federal defts. in opposition to pltfs. motion for summary judgment; statement of genuine issues; exhibit A.

Mar 15 STIPULATION of pltf. in response to defts. statement of genuine issues necessary to be litigated; exhibit A.

Mar 19 MOTION of pltf. for summary judgment heard, argued and taken under advisement. (Rep: R. Griffey) Gasch, J.

DATE	PROCEEDINGS

May 8 MEMORANDUM of the Court filed 5-7-79. (N) Gasch, J.

May 8 ORDER filed 5-7-79 granting motion of pltf. for summary judgment; defts. are hereby enjoined from enforcing Section 16(e) of the Fair Labor Standard Act, 29 USC 216(e) against pltf. and are further enjoined from requiring the payment of civil money penalties assessed against pltf. (N) Gasch, J.

May 17 NOTICE of appeal to the U.S. Supreme Court by defts. Govt. no fee. copy mailed to Thomas W. Power.

May 17 MOTION of defts. for a stay of the judgment entered on 5-7-79, pending appeal, including defts. statement in support thereof; affidavit of Lucille C. Pinkett; affidavit of William R. Riese; affidavit of Herbert J. Cohen.

May 29 STATEMENT of P&A's of pltf. in opposition to defts. motion for a stay pending appeal.

June 13 ORDER filed 6-12-79 denying motion of defts. for a stay pending appeal. (N) Gasch, J.

June 25 CHANGE of address of counsel for pltf.

Oct 18 TRANSCRIPT of proceedings of 5-18-79, pages 1-29. (Rep: J. Moore); Court copy.

Oct 18 TRANSCRIPT of proceedings of 3-19-79, pages 1-37, (Rep: J. Moore); Court copy.

Nov 14 LETTER dated 11-13-79 from Clerk, Supreme Court of the U.S. to Clerk, USDC to certify and transmit the entire record.

Nov 15 CERTIFIED copy of ORDER. U.S. Supreme Court noting probable jurisdiction in this case.

[SEAL]

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-CL-105

IN THE MATTER OF:

RAY MARSHALL, Secretary of Labor
United States Department of Labor, PLAINTIFF

v.

JERRICO, INC., RESPONDENT

Before: PETER McC. GIESEY
Administrative Law Judge

DECISION AND ORDER

This is a proceeding brought under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, *et seq.* (hereafter "the Act")[1] and Regulations promulgated

---

[1] Specifically, section 216(e);

(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

(1) deducted from any sums owing by the United States to the person charged.

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, United States Code and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes" (29 U.S.C. 9a).

by the Secretary of Labor pursuant to authority under the Act.

A hearing was held on January 18 and 19, 1977 in Lexington, Kentucky. Briefly, the record shows the following.

Statement of the Case

The facts are undisputed unless otherwise indicated.

Jerrico, Inc. is engaged in the business of establishing, managing and operating restaurants. The annual gross volume of business during the relevant period herein (1974 and 1975) exceeded $250,000 yearly. Jurisdiction under the Act is not in issue.

Among the restaurants operated by Jerrico, Inc. are 39 or 40 enterprises trading as "Jerry's," located in Kentucky, Indiana, Tennessee, Georgia and Florida.

In 1969, an investigation of "Jerry's," Harrodsburg Road, Lexington, by a Department of Labor compliance officer disclosed that a 15 year old waitress had worked later than 7 p.m. in violation of Child Labor Regulation number 3.[2] The compliance officer testified that he delivered a notice (form 103) to the corporation controller.

---

[2] 29 C.F.R. 570.35(a), *viz.*;

. . . [employment of minor employees between 14 and 16 years of age] shall be confined to the following periods:

(1) Outside school hours;

[Footnote continued on page 6]

In June, 1971, a one page summary of Regulation number 3, on corporate letterhead paper, was circulated to restaurant managers.

In July, 1973, following an investigation at a restaurant known as "Jerry's #7" in Lexington, Kentucky, the investigating officer notified the manager that four busboys under the age of 16 had worked after 7 p.m. in violation of Regulation number 3. The manager testified that within two weeks of this notice, he received "a memo from the main office to comply with the law or get out."

Following an investigation of "Jerry's #2" in Lexington, a compliance officer notified a corporate vice president, in December, 1974, of the fact that two waitresses at that restaurant had worked later than 7 p.m. in violation of Regulation number 3.[3]

Following an investigation of 5 or 6 of respondent's restaurants, in March, 1975, the investigating officer notified respondent's regional manager that two employees under the age of 16 were employed in the kitchens of two restaurants in Shelbyville, Kentucky, in violation of Regulation number 3.[4]

---

[2] [Continued]

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer . . . when the evening hour will be 9 p.m.

* * * * *

[3] The corporate officer testified that he could not recall the occasion.

[4] 29 C.F.R. 570.34(b)

* * * * *

Paragraph (a) of this section [permitted occupations] shall not be construed to permit the application of this subsection to

In June, 1975, a compliance officer went to Jerrico's home office in Lexington to investigate two restaurants. Finding violations of the child labor regulations, he determined that the investigation should be broadened to include all of the "Jerry's" restaurants in the five state area mentioned, *supra*. The investigation covered employment during the two year period from June, 1973 to June, 1975. On August 1, 1975, the compliance officer notified corporate counsel that the investigation disclosed that 169 minors had been, or were presently, employed by respondent in violation of the child labor provisions of the Act.

Briefly, the violations consisted of;

1. Employment of 7 persons under the age of 14.
2. Employment of 162 persons under the age of 16 for periods and at hours forbidden by Regulation number 3.
3. Employment of two of the above 162 persons in occupations not permitted by Regulation number 3.

In due course a penalty was assessed against respondent. The assistant regional administrator calculated the penalties, giving consideration to factors set forth in section 216(e) of the Act and Regulations (29 C.F.R. 579.5) promulgated by the Secretary for such purpose.

The penalties were as follows:

Violation 1	$ 2,100
Violation 2	16,200
Violation 3	200

. . . the following occupations in . . . food service . . . establishments.

* * * * *

(5) Cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking.

* * * * *

Although the compliance officer who conducted this investigation testified, he did not state whether these violations involved prohibited hours or prohibited occupations. The form 103's identify the violations only as "CL Reg. 3."

added to this amount was the sum of $84,500, representing $500 for each of the 169 persons employed for periods and under conditions similar to those found in previous investigations of respondent's restaurants.[5]

At the hearing, respondent's corporate officers who testified professed ignorance of violations of the child labor section of the Act earlier than those of which they were notified following the latest investigation.

Nevertheless, it is undisputed that, within the year following notification of a corporate officer (who did not testify) of the violations which occurred in 1969, some responsible officer at respondent's corporate headquarters circulated a summary of the Act's child labor requirements to restaurant managers. The manager of a restaurant at which violations were discovered in 1973 received a memo "from the main office" shortly after the conclusion of the investigation advising him "to comply with the law or get out."

Respondent's vice president testified that it was "very difficult to effect compliance with the law," explaining that at 6:30 and 9:00 p.m., "the restaurant is going 120 percent" because this is the dinner hour. According to the witness," a manager under pressure is not going to tell a [minor] to go home."

He also explained that violations of this nature were not as obvious at the corporate headquarters as the testimony of one of plaintiff's witnesses suggested. Thus, although employee's time cards bear, *inter alia*, their dates of birth, the timecard is not submitted to headquarters until a week after the payroll has been prepared because each restaurant manager submits a weekly "computer sheet" from information on the timecards, which compilation serves as the payroll source.

Respondent's general counsel testified that the workforce turnover during the two years covered by the investigation was in excess of 8,500 persons and that the turnover from 1969 to 1975 was in excess of 13,500 employees. He also testified that when he was informed, following the 1975 investigation, that 169 violations had been discovered, he realized that "there was a problem in all the stores" that the difficulty was "chain wide." In consequence, he recommended that company policy be changed and that management announce to the restaurant managers that no persons under the age of 16 would henceforth be hired and that currently employed persons under that age be discharged. His recommendations was accepted and the policy was announced in July, 1975. He stated that an additional consequence of the discovery of "chain-wide" violations was the discharge of "2 to 3" restaurant managers.

[5] 29 C.F.R. 579.5(c), *viz.*;

> In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity the violation or violations, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations.

Findings of fact and Conclusions of Law

Having considered the entire record, including the testimony, exhibits and briefs, and having observed the demeanor of the witnesses, I make the following findings of fact, conclusions of law and decision and order based thereon.

Jurisdiction is not in dispute.

The facts are set forth, *supra.*

Concerning the disputed question of notice to respondent of violations of child labor Regulations in 1969, 1973, 1974 and 1975, I credit the testimony of the solicitor's witnesses, and find that in each case a responsible agent of respondent was timely notified. That is not to say that I believe respondent's witnesses testified falsely. Rather, I believe that their memories were less precise and that a significant circumstance in this matter is directly related to the substance of such testimony and the reasons therefor.

Thus, the record demonstrates that the earlier violations were regarded by responsible management as isolated, unusual and easily corrected by a combination of education—the 1971 memorandum summarizing requirements—and straightforward exercise of management prerogative—the 1973 direction to the manager of "Jerry's #7" to "comply with the law or get out." I credit re-

spondent's witness' testimony that it was not until notification of the wide-spread violations upon which the instant proceedings are based, that management realized that the problems were "serious" and "chain-wide." Whether management's immediate action to eliminate the circumstances which underlay the violations and discipline some of the responsible restaurant managers was motivated by a desire to avoid the threatened imposition of a significant money penalty or a public spirited impulse to abide by the Act is of no consequence. The immediate and far-reaching actions taken are, if not probative, at least corroborative of respondent's officials protestations that they sincerely believed that necessary and reasonable corrective action had long since been taken and that violations which had been minor and infrequent in the past had ceased as a result of measures reasonably calculated to correct the underlying causes.

Another circumstances which I perceive to have been afforded greater weight than warranted was the presence of a birth date on each timecard examined by the compliance officer. Thus, asked when he reached the conclusion that the violations were willful, he replied, ". . . when I saw the extent [and] nature . . . and I saw that here we had violations on the face of the record and we had 20 at [a] time . . . and the indication of the violations were contained in the date of birth and the information [was] available on the time cards [,] the Employer had knowledge. . . ." Plainly, he assumed that each week some agent of respondent, in making up the payroll, read or could have read information showing that the employee was a minor and at the same time calculated a pay check representing what could not be mistaken for anything but payment for working an unlawful number of hours or hours during which employment was prohibited or both. The record shows, however, that this was not the case. Rather, the payroll was prepared from "computer sheets" and the time cards, which did indeed show violations on their face, were submitted a week later only to serve as base records consulted in the event of erroneous calculations or other circumstances requiring the checking of bases for events (payment) which had already occurred.

These circumstances are not exculpatory. Nevertheless, they explain the circumstances underlying the assessing officer's conclusion that the violations were repeated and willful. Accordingly, to the extent that the judgment concerning willfulness rests upon these matters. I must disagree.

What the record reveals is a course of violations, first disclosed in the 1969 investigation. From that time until the disclosure of "chain-wide" violations in the instant case, management had no reason to believe that corrective actions taken were ineffective. With the exception of the 1971 memorandum, corrective action was selectively directed to what management reasonably believed to be isolated instances of violations of the child labor regulations. I do not question the Secretary's assertion that management could have discovered this continuous and wide-spread course of conduct engaged in by its managers. Perhaps the record discloses evidence of poor management. If so, it is not so poor as to become "willful." I am unwilling to base a determination in a mixed matter of fact and law upon business judgment in a field in which neither I nor the Secretary possess expertise. It begs the question to assert that it need not be proved that respondent had evil intent. It must be shown that respondent knew of the violations or should have known of the violations by the exercise of reasonable care. The record shows that, before learning that the violations were "chain-wide," respondent took steps reasonably calculated to stop current violations and prevent further abuse. Similarly, learning of the extent of violations in 1975, it took swift and appropriate action. In short, I find that the Secretary has not established a record upon which to base a reasonable determination that the violations were willful or that Jerrico's management failed to take reasonable precautions to avoid violations.

That the violations occurred is undisputed. Respondent's responsibility cannot be disputed. Nor can respondent dispute the fact that at the time of the violations, the statute provided that "[a]ny person who violates the provisions . . . relating to child labor, or any regulation issued under that section, shall be subject to a civil

penalty not to exceed $1,000 for each such violation." In these circumstances, it does not lie in respondent's mouth to assert that because the violations occurred before the Secretary promulgated guidelines for the determination of the amounts of penalties, no penalties may be assessed. Ironically, the guidelines complained of served to reduce the penalty assessed below that authorized by the statute. Nor were the regulations applied retroactively. In the process of administering the Act, the last process is the assessment of the penalty. The process was accomplished after the effective date of the regulations. The position of respondent that it is somehow prejudiced by having been penalized in an amount less than the $169,000 which reading the statute would have disclosed was its maximum exposure when the violations occurred is sound in neither law nor logic.

Finally, respondent has failed to show that the elements considered by the Secretary and the methods employed in arriving at the amount of the penalty were in any way unreasonable or arbitrary.

ORDER

I affirm the determination of the Secretary that the violations for which a penalty was assessed did occur.

Jerrico, Inc. shall pay forthwith, in accordance with the Act and regulations thereunder, a penalty in the amount of $18,500.

/s/ Peter McC. Giesey
Administrative Law Judge

Dated: October 5, 1977
Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

GASCH, J.

JERRICO, INC.
d/b/a Jerry's Restaurants
P.O. Box 11988
Lexington, Kentucky 40503
606/276-2525, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF LABOR
2nd and Constitution Avenue, NW
Washington, DC 20210
202/523-8010

RAY MARSHALL
Secretary of Labor
U.S. Department of Labor
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STERLING WILLIAMS
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U.S. Department of Labor
1931 Ninth Avenue, South
Birmingham, Alabama 35205
205/325-3301, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought pursuant to the provisions of 28 U.S.C. § 1331 to secure from this Honorable Court an order declaring that Section 16(e) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 216(e) [hereinafter referred to as the FLSA] and regulations promulgated thereunder at 29 C.F.R. Parts 579 and 580 are unlawful and violate the Constitution of the United States and enjoining Defendants from enforcing said provisions.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this dispute under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1970); the jurisdictional provision of the Judicial Code relating to federal questions, 28 U.S.C. § 1331 (1970); 28 U.S.C. § 1361; the Declaratory Judgment Act, 28 U.S.C. § 2201 (1970); and the "All Writs" Act, 28 U.S.C. § 1651 (1970). The amount in controversy is $18,500, exclusive of interest and costs. This action arises under the due process clause of the Fifth Amendment to the United States Constitution. Venue is predicated upon 28 U.S.C. § 1391(e) (1970). Plaintiff has exhausted all administrative remedies within the United States Department of Labor (hereinafter referred to as D.O.L.).

PARTIES

3. The named Plaintiff, Jerrico, Inc., is engaged in the business of establishing, managing, and operating restaurants. Jerrico, Inc. is a Delaware corporation with its corporate headquarters located in Lexington, Kentucky. Among the restaurants operated by Jerrico, Inc. during the period in question, there were 40 establishments trading as "Jerry's" located in Kentucky, Indiana, Tennessee, Georgia and Florida.

4. The Defendant, United States Department of Labor, is an agency of the United States government. All individuals named as Defendants are officials of the U.S. Department of Labor who, acting in their official capacities, are responsible for implementing and enforcing the FLSA and the regulations promulgated pursuant thereto. The individuals named as Defendants are sued in their representative capacities in which they are ultimately responsible for enforcement of the FLSA and regulations, and are ultimately responsible for the actions challenged in this complaint. The declaratory and injunctive relief requested herein is not confined to the named Defendants personally, but extends to and includes all of the employees, officers, attorneys, and agents of the United States Department of Labor.

NATURE OF CONTROVERSY

5. An administrative proceeding was commenced by the Defendants against the Plaintiff pursuant to Section 216(e) of the FLSA and applicable regulations charging violations of the child labor regulations contained at 29 C.F.R. 570.35(a). At the completion of the administrative hearing and after the submission of proposed findings of fact and conclusions of law by both parties Administrative Law Judge Peter McCann Giesey entered judgment in favor of the Labor Department in the amount of $18,500 and ordered Jerrico, Inc. to pay the penalty forthwith.

6. This complaint does not challenge the determination by Judge Giesey except to the extent that Plaintiff challenges the constitutionality of Section 216(e) of the FLSA which reads in relevant part:

> ". . . Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the

costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9(a))".

The Section of the "Act" referenced in the above quote states:

> "All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States." (29 U.S.C. § 9(a))

7. The language of Section 216(e) referenced above is not permissive but rather states that penalties recovered in child labor administrative actions such as that involved herein "shall" be applied toward reimbursement of the costs of determining, collecting, and assessing such penalties. The language of Section 9(a) provides that monies received shall be deposited to the credit of the division which supervised the work and may be used for the ordinary expenses of the division. To the best of Plaintiff's knowledge, Section 216(e) of the FLSA is the only United States Code provision in existence which contains language mandating that penalties collected by a United States government agency be used to reimburse the agency for determining, assessing, and collecting the penalties. Such a procedure creates actual bias, the potential for bias, and the appearance of bias. To avoid such bias all other United States statutes, pursuant to which civil money penalties are imposed, provide that monies collected as penalties be deposited in the general treasury of the United States. Section 216(e) of the

FLSA is, therefore, unconstitutional as violative of the due process requirements of the Fifth Amendment to the United States Constitution.

PRAYER

WHEREFORE, Plaintiff prays this Honorable Court to issue the following:

1) A judgment declaring that Section 216(e) of the FLSA and regulations promulgated thereunder for the assessment and collection of civil money penalties by the Defendants violate the due process clause of the Fifth Amendment to the United States Constitution, and

2) A judgment enjoining and restraining preliminarily and permanently Defendants, their agents, and employees from enforcing Section 216(e) of the FLSA and the regulations promulgated thereunder, and

3) An order granting Plaintiff costs and attorneys fees incurred in the bringing of this action, and such other relief as may be found by the Court to be proper.

Respectfully submitted,

/s/ Thomas W. Power
THOMAS W. POWER

/s/ Robert D. McDonald
ROBERT D. MCDONALD
Attorneys for Plaintiff

DATED: January 25, 1978

VERIFICATION

DISTRICT OF COLUMBIA) ss:

Robert D. McDonald, being duly sworn, deposed, and says that he is associate counsel for Jerrico, Inc. in the above-titled matter, that he has been specifically authorized to verify this Complaint, that he has read the foregoing Complaint, and that the contents thereof are true either of his own knowledge or on the basis of information and belief.

/s/ Robert D. McDonald
ROBERT D. MCDONALD

SUBSCRIBED AND SWORN to before me this 24th day of January, 1978.

/s/ Nora M. Burus
Notary Public, D.C.

My Commission Expires Dec. 14, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Received May 26, 1978]

Civil Action No. 78-0128

JERRICO, INC.
d/b/a Jerry's Restaurants, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.,
DEFENDANTS

ANSWER

The defendants answer the Plaintiff's complaint as follows:

First Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

1. Defendants allege that paragraphs 1 and 2 of plaintiff's complaint contain conclusions of law, relate to jurisdiction and venue, are descriptive, and thus require no answer, but to the extent that an answer is required, each of the same is hereby categorically denied.
2. Defendants admit the allegations contained in paragraphs 3, 4, 5, & 6 of plaintiff's complaint.
3. Defendants deny the allegations contained in paragraph 7 of the complaint and the prayers for relief contained therein.

WHEREFORE defendants, having fully answered, pray that the complaint against them be dismissed and that the plaintiff take nothing.

Respectfully submitted,

CARIN ANN CLAUSS
Solicitor of Labor

RONALD G. WHITING
Associate Solicitor
Division of General Legal Services

PAUL E. MYERSON
Counsel for Employment Standards

ELIZABETH S. BONFILS
Assistant Counsel

MARCIA A. LURENSKY
Staff Attorney

Attorneys for Defendants

/s/ Paul E. Myerson

Mailing Address:

200 Constitution Avenue, NW
Room N-2464
Washington, D.C. 20210
(202) 523-8244

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Answer was mailed on this 26 day of May, 1978, to Thomas W. Power, Esq., and Robert D. McDonald, Esq., Attorneys for Plaintiff, 1666 K Street, NW, Suite 611, Washington, D.C., 20006.

/s/ Paul E. Myerson
PAUL E. MYERSON
Counsel for Employment Standards
Division of General Legal Services

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

[Received Oct. 23, 1978]

JERRICO, INC., PLAINTIFF

v.

U.S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

FEDERAL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

The Federal defendants, in answer to Plaintiff's Interrogatories (First Set), state as follows:

INTERROGATORY NO. 1:

Please state for the period commencing July 18, 1975 and ending on the date of your response to these interrogatories the total dollar figure for child labor civil money penalties assessed by the U.S. Department of Labor pursuant to its Fair Labor Standards Act authority, 29 U.S.C. § 216(e). If you are unable to provide an exact dollar figure, please provide your best estimate of the dollar figure requested providing the names of the persons with whom you consulted in arriving at this estimate, and state with specificity the information each person provided, and the analysis and substance of the analysis which was utilized in arriving at the estimate.

ANSWER TO INTERROGATORY NO. 1:

On the basis of information furnished to the undersigned by Karen Severn, Budget Analyst, United States Department of Labor, Room C-3307, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-7078, and William Nakamura, Administrative Of-

ficer, Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-7531, the following information is submitted:

Date	Amounts Assessed
7/18/75-9/20/77	$1,283,155
9/21/77-9/20/78	$1,850,831

INTERROGATORY NO. 2:

With reference to the child labor civil money penalty assessments referenced in INTERROGATORY NO. 1, please answer the following:

(a) What dollar amount of such penalties has been collected by the Labor Department to the date of your responses to these interrogatories?

(b) What is the present location of penalties collected?

(c) Has the Labor Department allocated any portion of the penalties collected to any bureau, service, office, division, or other agencies of the Department of Labor for the purposes of reimbursing those offices for the cost of determining the violations, and assessing and collecting such penalties?

(d) If the answer to (c) is yes, please state with particularity the criteria that were employed in distributing the collected penalties, the amounts distributed, the purpose for which the penalties were distributed, and the name of the official or the bureau, service, office, division, or other agencies of the Department of Labor to which monies were distributed.

(e) If the answer to (c) is no, does the Department of Labor propose to distribute the monies collected on the basis of the actual cost of work performed, including salaries and apportioned overhead of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work? If yes, when will such a program commence?

(f) Assuming that penalties collected exceed the costs of all bureaus, services, offices, divisions, or other agencies

of the U.S. Department of Labor in determining the violations assessing and collecting such penalties, what does the U.S. Department of Labor propose to do with excess penalties collected in such a case?

(g) Does the Department of Labor intend to reimburse costs of various bureaus, services, offices, divisions, or other agencies of the Department of Labor in determining the violations and assessing and collecting child labor penalties in relation to the amount of penalties collected from the investigations in which that particular bureau, service, office, division, or other agencies of the Department of Labor was involved? If so, please describe what system of apportionment would be used?

(h) Does the Department of Labor intend to develop some reimbursement system as referenced in (g) whereby commissions, bonuses, or other additional compensation is provided to those bureaus, services, offices, divisions, or other agencies of the Department of Labor, or individuals, which have been successful in collecting large amounts of child labor penalties? If so, please explain the system which will be utilized.

(i) If the answers to (e), (f), (g), and (h) were all in the negative, please state with particularity the purpose to which monies collected as child labor civil money penalties will be used by the Department of Labor.

ANSWER TO INTERROGATORY NO. 2:

On the basis of information furnished to the undersigned by Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards, Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-8353, and Lucille C. Pinkett, Chief, Branch of Child Labor, Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Room S-3022, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-8412, the following information is submitted:

INTERROGATORY NO. 2:

With reference to the child labor civil money penalty assessments referenced in INTERROGATORY NO. 1, please answer the following:

What dollar amount of such penalties has been collected by the Labor Department to the date of your responses to these interrogatories?

ANSWER TO INTERROGATORY NO. 2(a):

Date	Total Collections
November 1975	
June 1976	$ 70,565.00
Transition Quarter	80,364.00
Total FY 1976	$150,929.00
10/1/76-9/30/77	$649,814.00
10/1/77-8/31/78	$592,527.60

INTERROGATORY NO. 2(b):

What is the present location of penalties collected?

ANSWER TO INTERROGATORY NO. 2(b):

All child labor penalty monies were used as reimburseables in FY 1976 and FY 1977. Appropriated funds were returned to the Treasury. No disbursements have been made with funds collected in FY 1978. Monies are currently being held in a Treasury account.

Unobligated balance lapsed FY 1976 + TO $981,000
Unobligated balance lapsed FY 1977 $870,000
Estimated lapse to U.S. Treasury for FY 1978 $4,600,000

INTERROGATORY NO. 2(c):

Has the Labor Department allocated any portion of the penalties collected to any bureau, service, office, division, or other agencies of the Department of Labor for the purposes of reimbursing those offices for the cost of

determining the violations, and assessing and collecting such penalties?

ANSWER TO INTERROGATORY NO. 2(c):

Date	Funds Allotted	Distribution
Transition Qtr.	$ 82,578	
6/8/76	47,886	
6/28/76	16,735	
Total FY 1976	$147,199	National Office—W-H
FY 1977	$194,800	National Office—W-H
	5,700	Boston—W-H, Reg. Ofc.
	10,800	New York—W-H, Reg. Ofc.
	11,900	Phila.—W-H, Reg. Ofc.
	39,200	Atlanta—W-H, Reg. Ofc.
	44,300	Chicago—W-H, Reg. Ofc.
	21,300	Dallas—W-H, Reg. Ofc.
	9,000	Kansas City—W-H, Reg. Ofc.
	4,900	Denver—W-H, Reg. Ofc.
	12,400	San Fran.—W-H, Reg. Ofc.
	5,500	Seattle—W-H, Reg. Ofc.
	200,000	Solicitors Office (SOL)
Total FY 1977	$559,800	
FY 1978	—	Held in Treasury
FY 1979	—	Held in Treasury

INTERROGATORY NO. 2(d):

If the answer to (c) is yes, please state with particularity the criteria that were employed in distributing the collected penalties, the amounts distributed, the purpose for which the penalties were distributed, and the name of the official or the bureau, service, office, division, or other agencies of the Department of Labor to which monies were distributed.

ANSWER TO INTERROGATORY NO. 2(d):

Funds were allocated and distributed to the bureaus, offices, services, or divisions identified in answer no. 2(c) hereof for the purpose of reimbursement of child labor obligated funds. Field allotments were made in pro rata distribution based on total obligations incurred in connec-

tion with child labor enforcement. National Office allotments were made as reimbursements of costs for administration. Transfer of funds to the Office of the Solicitor was reimbursement for costs incurred in litigation of child labor matters.

INTERROGATORY NO. 2(e):

If the answer to (c) is no, does the Department of Labor propose to distribute the monies collected on the basis of the actual cost of work performed, including salaries and apportioned overhead of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work? If yes, when will such a program commence?

ANSWER TO INTERROGATORIES NO. 2(e):

For FY 1976, see answer to Interrogatory No. 2(c).
For FY 1977, see answer to Interrogatory No. 2(c).
For FY 1978, no funds have been allocated or disbursed.
For FY 1979, no determination has been made.

INTERROGATORY NO. 2(f):

Assuming that penalties collected exceed the costs of all bureaus, services, offices, divisions, or other agencies of the U.S. Department of Labor in determining the violations assessing and collecting such penalties, what does the U.S. Department of Labor propose to do with excess penalties collected in such a case?

ANSWER TO INTERROGATORY NO. 2(f):

Remit to Treasury of the United States.

INTERROGATORY NO. 2(g):

Does the Department of Labor intend to reimburse costs of various bureaus, services, offices, divisions, or other agencies of the Department of Labor in determining

the violations and assessing and collecting child labor penalties in relation to the amount of penalties collected from the investigations in which that particular bureau, service, office, division, or other agencies of the Department of Labor was involved? If so, please describe what system of apportionment would be used?

ANSWER TO INTERROGATORY NO. 2(g):

No.

INTERROGATORY NO. 2(h):

Does the Department of Labor intend to develop some reimbursement system as referenced in (g) whereby commissions, bonuses, or other additional compensation is provided to those bureaus, services, offices, divisions, or other agencies of the Department of Labor, or individuals, which have been successful in collecting large amounts of child labor penalties? If so, please explain the system which will be utilized.

ANSWER TO INTERROGATORY NO. 2(h):

No.

INTERROGATORY NO. 2(i):

If the answers to (e), (f), (g), and (h) were all in the negative, please state with particularity the purpose to which monies collected as child labor civil money penalties will be used by the Department of Labor.

ANSWER TO INTERROGATORY NO. 2(i):

To the extent funds collected from penalties are used by the Department of Labor, such use will be as reimbursement of obligated child labor expenditures.

INTERROGATORY NO. 3:

Please provide your best estimate of the total time devoted to child labor administrative adjudications by the Office of the Administrative Law Judges of the U.S.

Department of Labor from July 18, 1975 to the date of your response to these interrogatories. Please indicate your best estimate of the proportion which such time bears to the total time by such office devoted to all responsibilities it has to the U.S. Department of Labor. In addition, please provide the names of the persons with whom you consulted in arriving at this estimate, and state with specificity the information each person provided, and the analysis and substance of the analysis which was utilized in arriving at the estimate.

ANSWER TO INTERROGATORY NO. 3:

In the basis of information furnished to the undersigned by H. Stephen Gordon, Chief Judge, Office of Administrative Law Judges, United States Department of Labor, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036, telephone (202) 653-5052, the following information is submitted for the period July 18, 1975 through May 30, 1978:

Number of child labor cases docketed: 167

Number of total cases docketed: 12,470

Percentage of child labor cases to total: 1.3%

Listed below are the statutes under which administrative proceedings are conducted by the Office of Administrative Law Judges, United States Department of Labor:

1. *LONGSHORMEN'S AND HARBOR WORKERS' COMPENSATION ACT*
   33 U.S.C. § 901, *es seq.*
2. *DISTRICT OF COLUMBIA COMPENSATION ACT*
   36 D.C. Code § 501, *et seq.*
3. *DEFENSE BASE ACT*
   42 U.S.C. § 1651, *et seq.*
4. *OUTER CONTINENTAL SHELF LANDS ACT*
   43 U.S.C. § 1331, *et seq.*

5. *NON-APPROPRIATED FUND INSTRUMENTALITIES ACT*
   5 U.S.C. § 171, *et seq.*
6. *FEDERAL COAL MINE HEALTH AND SAFETY ACT AS AMENDED BY THE BLACK LUNG BENEFITS ACT OF 1972*
   30 U.S.C. § 901, *et seq.*
7. *WAGNER-PEYSER ACT OF 1933*
   29 U.S.C. § 49, *et seq.*
8. *IMMIGRATION AND NATIONALITY ACT*
   8 U.S.C. § 1101
9. *WATER POLLUTION*
   33 U.S.C. §§ 466, 1367
10. *FARM LABOR CONTRACTOR REGISTRATION ACT*
    7 U.S.C. § 2041, *et seq.*
11. *OCCUPATIONAL SAFETY AND HEALTH ACT*
    29 U.S.C. § 667
12. *FAIR LABOR STANDARDS ACT*
    29 U.S.C. § 201
13. *NATIONAL REVIEW PANEL*
    29 C.F.R. § 357.9
14. *BOARD OF CONTRACT APPEALS—U.S. DEPARTMENT OF LABOR*
    5 U.S.C. § 301, Reorganization Plan No. 6 of 1950, 15 F.R. 3174, 64 Stat. 1263, 5 U.S.C. Appendix
15. *SERVICE CONTRACT ACT*
    41 U.S.C. § 351, *et seq.*
16. *DAVIS-BACON ACT*
    40 U.S.C. § 276a, *et seq.*
17. *CONTRACT WORK HOURS STANDARDS ACT*
    40 U.S.C. § 328, *et seq.*

18. *NATIONAL HOUSING ACT*
12 U.S.C. § 1713, *et seq.*

19. *HOSPITAL SURVEY AND CONSTRUCTION ACT*
42 U.S.C. § 29(h)

20. *FEDERAL AIRPORT ACT*
49 U.S.C. § 1114

21. *HOUSING ACT OF 1949*
42 U.S.C. § 1459

22. *SCHOOL SURVEY AND CONSTRUCTION ACT OF 1950*
20 U.S.C. § 636

23. *DEFENSE HOUSING AND COMMUNITY FACILITIES AND SERVICES ACT OF 1951*
42 U.S.C. 15921

24. *UNITED STATES HOUSING ACT OF 1937*
42 U.S.C. § 1416

25. *FEDERAL CIVIL DEFENSE ACT OF 1950*
50 U.S.C. App. § 2281

26. *AREA REDEVELOPMENT ACT*
42 U.S.C. § 2518

27. *DELAWARE RIVER BASIN COMPACT*
75 Stat. 714, Sec. 15.1

28. *HEALTH PROFESSIONS EDUCATIONAL ASSOCIATION ACT OF 1963*
42 U.S.C. § 292 d(c), 293a(C) (5)

29. *MENTAL RETARDATION FACILITIES CONSTRUCTION ACT*
42 U.S.C. §§ 295(a) (2) (d), 2662(5), 2675(a) (5)

30. *COMMUNITY MENTAL HEALTH CENTERS ACT*
42 U.S.C. § 2685(a) (5)

31. *HIGHER EDUCATIONAL FACILITIES ACT OF 1963*
20 U.S.C. § 753

32. *VOCATIONAL EDUCATIONAL ACT OF 1963*
20 U.S.C. § 35f

33. *LIBRARY SERVICES AND CONSTRUCTION ACT*
20 U.S.C. § 355(a) (4)

34. *URBAN MASS TRANSPORTATION ACT OF 1964*
78 Stat. 307, Sec. 10a

35. *ECONOMIC OPPORTUNITY ACT OF 1964*
78 Stat. 532, Sec. 607

36. *PUBLIC HEALTH SERVICE ACT*
78 Stat. 454, Sec. 605(a) (5)

37. *HOUSING ACT OF 1964*
78 Stat. 795

38. *THE COMMERCIAL FISHERIES RESEARCH AND DEVELOPMENT ACT OF 1964*
78 Stat. 199, Sec. 7

39. *THE NURSE TRAINING ACT OF 1964*
78 Stat. 910, Sec. 2

40. *ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965*
20 U.S.C. § 239

41. *APPALACHIAN REGIONAL DEVELOPMENT ACT OF 1965*
79 Stat. 5, Sec. 402

42. *NATIONAL TECHNICAL INSTITUTE FOR THE DEAF ACT*
79 Stat. 125, 126, Sec. 5(b) (5)

43. *OFFICE OF FEDERAL CONTRACT COMPLIANCE* (Public Contracts and Property Management)

EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

E.O. 11246

44. *LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE*

E.O. 11491

45. *EMPLOYEE-MANAGEMENT RELATIONS IN THE FOREIGN SERVICE OF THE UNITED STATES*

E.O. 11636

46. *REHABILITATION ACT OF 1973*
29 U.S.C. 793; E.O. 11758

47. *WALSH-HEALEY ACT*
41 U.S.C. § 35, *et seq.*

48. *COMPREHENSIVE EMPLOYMENT AND TRAINING ACT (CETA)*

Pub. Law 92-203, 87 Stat. 839
Pub. Law 93-567, 88 Stat. 1845, Sec. 702(a)

49. *SAFETY, etc. SECTION 41, LONGSHOREMEN'S AND HARBOR WORKERS COMPENSATION ACT*

33 U.S.C. § 941; 29 C.F.R. § 1921.1, *et seq.*
(APA—1921.21)

50. *OCCUPATIONAL SAFETY AND HEALTH ACT—APPROVAL OF STATE PLANS*

29 C.F.R. § 1902.11(e)

51. *FAIR LABOR STANDARDS ACT—Fair value of board, lodging, or other facilities*

29 U.S.C. § 203(m); 29 C.F.R. 531.3, *et seq.*

52. *INTEGRATED GRANT ADMINISTRATION*

Pub. Law 92-203, 87 Stat. 839
Pub. Law 93-567, 88 Stat. 1945, Sec. 702(a)

53. *TOXIC SUBSTANCES CONTROL ACT*

Pub. Law 94-469, 90 Stat. 2003
(10/11/76, effective January 1, 1977)
[Section 23—Employee Protection
15 U.S.C. § 2622]

54. *RESOURCE CONSERVATION AND RECOVERY ACT OF 1976*

Pub. Law 94-580, 90 Stat. 2795
(10/21/76, effective January 1, 1977)
[Section 7001—Employee Protection
42 U.S.C. § 6971]

55. *RESOURCE CONSERVATION AND RECOVERY ACT OF 1976*

Pub. Law 94-580, 90 Stat. 2795
[Section 7009—Wage Standards (Davis-Beacon)]

INTERROGATORY NO. 4:

Please state for the period commencing July 18, 1975 and ending on the date of your responses to these interrogatories, the number of Administrative Law Judges assigned to the Office of the Chief Administrative Law Judge, U.S. Department of Labor at the beginning and at the end of the period.

ANSWER TO INTERROGATORY NO. 4:

On the basis of information furnished to the undersigned by H. Stephen Gordon, Chief Judge, Office of Administrative Law Judges, United States Department of Labor, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036, telephone (202) 653-5052, the following information is submitted:

Number of ALJs on board in July of 1975: 29

Number of ALJs on board as of June 20, 1978: 46

Number of ALJs hired only for child labor cases: 0

Number of ALJs hearing only child labor cases: 0

INTERROGATORY NO. 5:

Please provide your best estimate of the total time devoted to child labor investigations, penalty assessment procedures, appearances at administrative hearings, Federal or State court proceedings, and other related activities by Wage and Hour Division Compliance Officers, Associate Regional Administrators, and other involved Wage and Hour Division employees for the period commencing July 18, 1975 and ending on the date of your responses to these interrogatories and the relationship such time bears to the time spent by such employees in meeting all their responsibilities. In addition, please provide the names of the persons with whom you consulted in arriving at this estimate, and state with specificity the information each person provided, and the analysis and substance of the analysis which was utilized in arriving at the estimate.

ANSWER TO INTERROGATORY NO. 5:

On the basis of information furnished to the undersigned by Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards, Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-8353, the following information is submitted:

During the period July 18, 1975 through June 30, 1978, an estimated 140,744 hours were spent by Wage and Hour personnel in child labor enforcement related matters. This estimate is based upon the records maintained with respect to Compliance Officers in the field pursuant to the Department's Financial Management Reporting System (FMRS) and estimates of Field and National Office clerical and professional employees for whom detailed time/program records are not kept. The estimates of field supervisory and clerical time expenditures were

secured from the Assistant Regional Administrators in each region. Estimates of National Office staff time expenditures were developed by Lucille C. Pinkett, Chief, Branch of Child Labor; Francis W. McGowan, Director of the Division of Equal Pay and Employment Standards; and Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards.

It is estimated that approximately 2 percent of total staff time is spent on child labor matters. Because of the nature of the FMRS data reported by Compliance Officers, the system tends to capture such data on the basis of the principal program of concern in each investigation rather than on the basis of time which might actually be spent in the various programs. It is quite probable, for example, that time spent in simultaneously checking for FLSA minimum wage, overtime, and child labor noncompliance would be reported only under one of these categories, particularly if violations were found with respect to only one.

INTERROGATORY NO. 6:

Please provide your best estimate of the total time devoted to child labor investigations, penalty assessments, administrative proceedings, Federal or State court proceedings, and other related activities by employees of National or Regional Offices of the Solicitor of Labor, U.S. Department of Labor, for the period commencing July 18, 1975 and ending on the date of your responses to these interrogatories and the relationship such time bears to the time spent by such employees in meeting all responsibilities. In addition, please provide the names of the persons with whom you consulted in arriving at this estimate, and state with specificity the information each person provided and the analysis and substance of the analysis which was utilized in arriving at the estimate.

ANSWER TO INTERROGATORY NO. 6:

On the basis of information furnished by Glenn L. Hogle, Budget and Management Officer, Office of the Solicitor, United States Department of Labor, Room

S-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-6884; Alvin Bramow, Deputy Associate Solicitor, Division of General Legal Services, Office of the Solicitor, Room N-2464, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-8293; and his secretary, Melissa R. Trusheim, of the same address, telephone (202) 523-9186, the following information is submitted:

During the period July 18, 1975 through June 30, 1978, an estimated 26,874 hours or 12.920 staff years, have been spent by attorneys in the Office of the Solicitor in child labor enforcement matters. These figures represent approximately 1 percent of the total attorney staff of the Office of the Solicitor.

These estimates were compiled from the attorney workload records submitted as monthly time distribution reports by the 16 field offices and 10 Washington operating divisions comprising the Office of the Solicitor, United States Department of Labor.

Because of the nature of reporting, data relating to clerical and supervisory time in support of child labor enforcement is not available.

INTERROGATORY NO. 7:

With reference to amounts assessed as civil money penalties pursuant to Section 16(e)(3) of the Fair Labor Standards Act, 29 U.S.C. § 216(e)(3), for the period commencing July 18, 1975 and ending on the date of your responses to these interrogatories, please answer the following:

> Has any employee of the Wage and Hour Division, Solicitor's Office or Office of Administrative Law Judges of the U.S. Department of Labor inquired, to your knowledge or to the knowledge of others with whom you may reasonably be expected to consult, either verbally or in writing of any official of the U.S. Department of Labor including but not limited to: Paul Myerson, Counsel, Employment Standards; Elizabeth Bonfils, Assistant Counsel, Employment Standards; Herbert Cohen, Office of Fair Labor Standards; Xavier Vela, Wage and Hour Administrator; Warren Landis, Deputy Wage-Hour Administrator; Ronald James, former Wage-Hour Administrator; or any other present or past official of the U.S. Department of Labor, as to the method and/or amount of distributions of assessed child labor penalties to his or her agency, division, or office?

If yes, please state the name of the person inquiring, the name of the person to whom the inquiry, whether verbal or written, was addressed, the date or approximate date of the inquiry, the substance of the inquiry, and such other information as will enable any relevant documents to be identified in a subpoena for the production thereof.

ANSWER TO INTERROGATORY NO. 7:

The Federal defendants object to Interrogatory No. 7 on the grounds that said interrogatory is too broad in scope, too vague and general as to the information sought, and that it is virtually impossible to respond to Interrogatory No. 7 in detail and with accuracy. However, without waiving their objections, and as evidence of their desire to cooperate with the plaintiff and to comply as fully as is possible with plaintiff's request, the Federal defendants offer the following information in response to Interrogatory No. 7:

In all probability during the period since the Fair Labor Standards Act was amended in 1974 so as to provide for civil money penalties to be assessed against employers who violate the child labor provisions of the Act, there have been numerous conversations amongst individual employees of the Department of Labor regarding Section 16(e) of the Act (29 U.S.C. § 216(e)), relating to civil money penalties. It is impossible to remember or otherwise document the parties to such conversations (if any), the content of such conversations (if any), or the date or dates of such conversations (if any).

However, in an attempt to ascertain such information, the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, made written inquiry to all Wage and Hour Assistant Regional Administrators on June 21, 1978, copy attached and made a part hereof as Exhibit A. The responses received are likewise attached hereto, made a part hereof, and marked as Exhibits B, C, and D.

Further, at various conferences held both by the Wage and Hour Division and the Office of the Solicitor, the subject of child labor penalties was discussed in general. Additionally, various officials and employees of the Department of Labor may have discussed, with representatives of plaintiff and the attorneys representing the plaintiff, the basis of assessment and the possible use of such penalties.

There are no memoranda or documents relevant to defendants' response to Interrogatory No. 7.

Likewise, inquiry of the persons referred to by plaintiff in Interrogatory No. 7, has failed to produce more than a general acknowledgement that verbal inquiry may, from time to time, have been made.

Finally, many of the individuals identified in plaintiff's Interrogatory No. 7, were and are involved in the legal defense of this matter. Any conversations relating thereto were in the capacity as attorney and client; such conversations, therefore, are privileged.

All of the foregoing answers and the objections to Interrogatory No. 7 are based on information presently available to the Federal defendants.

CARIN ANN CLAUSS,
Solicitor of Labor,

RONALD G. WHITING,
Associate Solicitor,

PAUL E. MYERSON,
Counsel for Employment
Standards,

MARCIA A. LURENSKY,
Attorney,

ATTORNEY FOR DEFENDANTS.

Address:

U.S. Department of Labor
Office of the Solicitor
Room N-2464
200 Constitution Ave., N.W.
Washington, D.C. 20210

By: /s/ Marcia A. Lurensky
MARCIA A. LURENSKY
Attorney, Division of
General Legal Services

EXHIBIT A

Jun 21 1978

MEMORANDUM FOR: ALL WAGE-HOUR/ARA'S

FROM: Xavier M. Vela
Administrator
/s/ William L. Smith

SUBJECT: Information Needed for Response to Interrogatories in the Child Labor Case of Jerrico, Incorporated v. U.S. Department of Labor (Attachment—copy of Interrogatories in Civil Action No. 78-0128, U.S. D.C. for D.C.)

Briefly, plaintiffs in this suit have charged that FLSA's Section 16(e) is unconstitutional on the grounds that the Department's use of CP/CMP monies creates an inherent bias against impartial enforcement. In connection with subject suit, we have been served with the attached Interrogatories. In order to be fully responsive we need the information from you set out below. This information must be in my office by no later than COB July 10, 1978.

1. The name, date and circumstances under which you or anyone on your staff has been contacted by a representative of Jerrico Incorporated or the Office of Thomas W. Power, Esquire (attorney for Jerrico) in connection with the assessment, allocation to various offices, and/or disbursement of CL/CMP monies. Be fully descriptive. If there have been correspondence or written records of such contacts, forward copies.

2. With regard to Interrogatory #5, unless unusual circumstances exist we believe that CO time as reported on the WH-40 would be responsive insofar as CO time is concerned. AAD, AD, Assistant to ARA, RA and ARA time may have to be based on estimates by those

individuals. Please note that such time, where records do not exist of time spent, must be identified by the individuals, and it may be that some or all would subsequently be deposed.

3. With regard to Interrogatory #7, this Interrogatory is self explanatory. Note the specificity required and the fact that the individuals must be identified. To the extent that there are written records of requests, notes of meetings or conversations, or other documentation, please include copies of them in your submission.

EXHIBIT B

Atlanta Region

ATTACHMENT 1

(Item 1 of Vela Memorandum 6/12/78)

1. ARA/WH Sterling B. Williams was contacted by telephone on December 24, 1975, by a Mr. Anderson and a Mr. Wilson (who were on extension telephones) regarding the CL/CMP assessment letter which Williams had sent to Jerrico. There is no record of this call, but a notation that such a call was made. Williams' recollection is that Messrs. Anderson and Wilson asked about the seemingly large amount of the assessment, and Williams explained that much of it was because the child labor violations were considered to be willful or recurring. When they professed to have no knowledge of previous investigations involving child labor, Williams suggested that they might want to contact Lexington Wage-Hour Area Director Ernest C. Orr for information about previous investigations.
2. Lexington CO Ernest F. Williams, Jr., was contacted by attorney Curtis L. Wilson, counsel for Jerrico, probably in December 1975. See CO Williams' memoranda 6/30/78, attached.
3. ARA/WH Sterling B. Williams was in contact with attorney Thomas W. Power when his deposition was taken 1/5/77 in Nashville, Tennessee in connection with the proceeding before an ALJ regarding the Jerrico CL/CMP assessment. This contact (the deposition) is a matter of court record, of course.
4. ARA/WH Sterling B. Williams was again in contact with attorney Thomas W. Power when he testified at the proceeding before the ALJ in Lexington, Kentucky, on 1/18/77. This testimony is a matter of court record, of course.

EXHIBIT C

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Suite C, Concord Square, 1460 Newton Road
Lexington, Kentucky 40505
(606) 233-2416

[SEAL]

DATE: June 30, 1978

REPLY TO:

ATTN OF:

SUBJECT: Contacts by Jerrico, Inc.

TO: Area Director Stuckey

To the best of my recollection the only representative of Jerrico, Inc, or the office of Thomas W Powers, who contacted me in connection with CL/CMP assessments was Curtis L Wilson, counsel for Jerrico, Inc. I remember that he called me shortly after he received the assessment letter. I don't remember the date but I think it was in December 1975. I do not recall exactly what was said and I do not recall making any kind of memorandum. I did not have the case file at the time and did not log time to the case. I do remember that Mr Wilson was shocked at the amount of the penalty assessment. As best I can recall I discussed the 1974 amendments and the limit of CL civil money penalties and I told Mr Wilson that I did not determine the appropriateness of any penalties.

Either at this time, or at a later time, —I do not remember when—, Mr. Wilson asked me about Form WH-265 and I told him that I could not give him information about the form. In both cases I referred him to the AD and/or ARA/WH.

I did not attempt to commit details to memory, and I do not have information of a more specific nature.

82
Ernest F Williams,Jr

EXHIBIT D

Atlanta Region

ATTACHMENT 3

(Item 3 of Vela Memorandum 6/21/78)

1. ARA/WH Sterling B. Williams remembers that at an ARA/WH Conference in December 1976, someone asked how the CL/CMP collections would be distributed, but he does not remember who made the inquiry. It is his recollection that the answer was only that the matter was still under study. This recollection is supported by WH/NO's summary of this Conference, which included the following as item 4 of "ACTION ITEMS DEVELOPED AT WAGE AND HOUR ARA CONFERENCE, WILLIAMSBURG, VA. (December 15-17, 1976)":

   "4. Prepare formula for allocation of major portion of CL-CMP's collected to the regions for furtherance of CL compliance efforts."

2. Two Area Directors (Gerald M. Parks, Ft. Lauderdale; and Labon F. Chappell, Jr., Jacksonville) report their recollection that someone asked the same question at an Atlanta Region AD Conference when a Washington representative was present, but neither remembers the date of the Conference or the identity of the Washington representative.

VERIFICATION

WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

Paul E. Myerson, being duly sworn, deposes and says:

He is an attorney employed by the United States Department of Labor, and is one of Defendants' counsel in the instant case and is authorized to make this verification on behalf of Defendants. He has read the foregoing Defendants' Answer to Plaintiff's Interrogatories (First Set) and believes the same to be true upon the basis of his knowledge and of information supplied to him.

/s/ Paul E. Myerson
PAUL E. MYERSON

Subscribed and sworn to before me
this 23rd day of October 1978.

/s/ Gwendolyn N. Jones
GWENDOLYN N. JONES
Notary Public

My Commission Expires Sept. 14, 1979

[SEAL]

EXHIBIT A TO PLAINTIFF'S STIPULATION IN RESPONSE TO DEFENDANT'S STATEMENT OF GENUINE ISSUES NECESSARY TO BE LITIGATED

EXHIBIT A

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

RE: W. J. Usery, Jr., Secretary of Labor vs. Jerrico, Inc. 76-CL-105

CERTIFICATION

This is to certify that the attached pages 3 through 7, and 26 through 28, are true and accurate copies of the Deposition of Sterling B. Williams taken on behalf of respondent in the above case on January 5, 1977.

/s/ Carol J. Ready
CAROL J. READY
Chief Legal Clerk

DATED: March 15, 1979

Attachments

* * * *

[3] MR. HAYNES: Mr. Power, may I interrupt just a moment?

MR. POWER: Sure.

MR. HAYNES: I think in order to make sure the record is perfectly clear, this deposition is being taken pursuant to the rules of practice provided for under the child labor provisions of the Fair Labor Standards Act and the regulations promulgated pursuant thereto. It is being taken without notice at the request of the respondent in this matter. The government has, by consent,

made available Mr. Williams for the purposes of taking this deposition.

BY MR. POWER:

Q All right. Among your responsibilities, you're authorized to represent the Secretary of Labor in assessing penalties under the child labor provisions of the Fair Labor Standards Act?

A Yes, sir.

Q To what extent of your present responsibilities does this responsibility represent? In other words, to what extent does assessing child labor penalties involve of your total responsibilities, if you have to make an estimate? Is it a major portion of your time or a very [4] minor portion?

A It is not the majority of my time, but it is a substantial amount of my time.

Q Assessing penalties under child labor?

A Yes, sir.

Q Could you give me an estimate in that term of majority? Is it more than twenty-five percent?

A I doubt that it would be that much.

Q Well, is it reasonable for me to assume that your responsibilities would probably involve some approximately ten percent of the total assessments of penalties in the United States by the Department of Labor? I'm just going by you—

A I do not know.

Q You would not hazard a guess, then?

A No.

Q Let me ask you another question. What happens to penalties, the sums that are collected as penalties under the Fair Labor Standards Act?

A The child labor civil money penalties?

Q Yes.

A It's my understanding that pursuant to the statute itself, the funds remain in the Department of Labor available for use by the Department of Labor for designated purposes.

[5] Q I see. And to what purposes would you mean by designated? Could you describe those purposes, where they might be used?

A No decision has yet been made, as far as I'm aware, by the department. There are still discussions about how the money should be used, discussions in progress.

Q I see. The act itself actually says that it should be credited to the cost of investigations of child labor violations under the act. Are you familiar with that provision?

A I do not know, by memory, the language of the statute.

Q Do you know whether the department has made any decision whether or not the funds should be used specifically for the Wage and Hour Division's activities and expenses?

A I do not, but if that's what the statute says, I assume that's what the decision will be.

Q Could it be used for handling the expenses of the solicitor's office?

A I do not know.

(At this time, a discussion was had off the record.)

BY MR. POWER:

Q Is it your understanding that the funds could be used for the expenses of operating the Wage and Hour [6] Division?

A That is my understanding.

Q Would it be your expectation that the funds would be apportioned in some manner to the operations under your responsibility, as opposed to the other Wage and Hour Division responsibilities? I'm just asking your opinion, now.

A Again, I would assume there would be some authorization for the federal establishment to use a designated amount of the funds.

Q Would you anticipate that part of the funds would be used in the compensation of employees under your direction and control?

MR. HAYNES: I'm going to interpose an objection for the record at this point. I think, in fact, the questions are a bit far afield, and certainly aren't relevant to the question of whether violations took place, nor to the reasonableness of the penalty involved.

MR. POWER: All right. Let me clarify, for the record and on the record, the thought that I have in mind here. We question the constitutionality of the statute itself, particularly because it provides for the application of the funds to the agency that makes the decision [7] regarding the amount of the penalty. Mr. Williams is the party that assessed the penalty. His own impressions or opinions to how the funds might be properly used, in our opinion, is relevant.

And I'll let the record stand as it is, because the initial response from Mr. Williams indicated there wasn't any decision made about where the funds were going to go anyhow. But that point, I do make, and I'll not pursue it any further, then.

MR. HAYNES: Very well.

BY MR. POWER:

Q In the course of your employment, you were assigned to the responsibility for evaluating the child labor violation or the alleged child labor violation of Jerrico Corporation, is that correct?

A Yes, sir.

Q When you first apprised of that investigation and the results of the investigation?

A Sometime in the fall of 1975.

* * * *

[26] Q And it is with these regulations that you have dealt during your experience with the Department of Labor?

A Yes, sir.

Q And you are familiar with them and are aware of contents of same?

A Yes, sir.

Q Did you have any role in the promulgation of the regulations to which you have referred in part 579?

A Not that I recall.

Q Mr. Williams, were you aware of the proposed amendments to the Fair Labor Standards Act which became effective May 1, 1974?

A Yes, sir.

Q Were you familiar on that date with the contents of said amendments?

A Yes, sir.

Q And you were aware of the provisions created by those amendments on May 1, 1974?

A Yes, sir.

Q Were you aware of the provisions of the act which required you to consider certain elements with respect to the assessment?

A Yes, sir.

Q You were aware, then, if I understand your testimony, that you were required by the regulation to [27] consider the size of the business and the gravity of the violations involved?

A Yes, sir.

Q And it is these factors to which you previously testify that you considered in making the proposed assessment?

A Yes, sir.

Q All right, sir. For the record, Mr. Williams, it might be helpful to have you explain how you came to make the assessment in this particular case; why you, rather than some other person, if you understand my question.

A I think I do. Under ordinary circumstances, the determination and assessment in this case would have been made by my counterpart in Atlanta, Mr. Hugh B. Campbell, who normally and regularly supervises the Wage-Hour function in the State of Kentucky through subordinate area officers. But at the time this assessment was under consideration, Mr. Campbell was on leave of absence because of a heart attack. And I was substituting for Mr. Campbell in the performance of this function.

Q And were you then authorized, pursuant to departmental regulations, to fill that role and to make said assessment?

A Yes, sir.

[28] Q You have been questioned, Mr. Williams, with respect to the utilization of penalty monies collected. Do you have any knowledge, at all, concerning what will be done with any penalty monies collected as a result of child labor violations?

A As I have stated previously here today, I'm not aware of a final decision having made made. I do know the matter has been under active and current discussion, and the discussions are in the direction of using the funds for enforcement expenses other than salary.

Q Then, any funds collected will not be used for salaries, insofar as you know?

A I cannot state they will not be. Insofar as I know, they will not be.

Q And so far as you know, will any funds so collected by used for any purpose other than direct enforcement of child labor regulations?

A Again, insofar as I know, they would not. But I'm not the one to make this decision.

Q Digressing a moment, Mr. Williams, with respect to Reg 3 which you have identified, was there any change in the substance of said regulation between May 1, 1974 and your proposed assessment in 1975 in this case?

A To the best of my knowledge, no.

* * * *

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

RE: W. J. Usery, Jr., Secretary of Labor vs. Jerrico, Inc.
76-CL-105

CERTIFICATION

This is to certify that the attached pages 141 through 144 are true and accurate copies of the Hearing Transcript in the above case held on January 18, 1977.

/s/ Carol J. Ready
CAROL J. READY
Chief Legal Clerk

DATED: March 15, 1979

Attachments

* * * *

[141] Q Was it your understanding that it was in fact left with the representative of Jerrico's based upon that information on that date?

A I assumed it was since it bears that date, but I do not have any present recollection of any contrary indication in the file. All I know is what the form shows.

Q Getting into another area, Mr. Williams, what happens to the penalties that are assessed in connection with child labor violations to your knowledge?

A They are transmitted by me to our administrative office in Washington where as far as I know, they are all still held on deposit.

Q Has there been any consideration as to what might be done with those particular penalties?

A There have been discussions but I do not think that any decision has been reached.

Q Do you know what the Statute provides as far as the use of those particular penalties?

A Not the exact language, but I think it says something like to be used by the Department for the enforcement of the Act.

Q Would it be fair to say to reimburse you for costs in connection with the enforcement of the Act?

[142] A Probably, yes sir.

Q And was that your understanding of the Statute in general terms at the time that you made the assessment?

MR. HAYNES: I am going to object. The Statute will speak for itself. I think Mr. Williams has already testified that no decision has been reached with respect to the allocation of any of these funds. He said he didn't know.

MR. POWER: I think Mr. Williams, Your Honor, Mr. Williams' understanding of what the Statute requires or provides is a very important consideration and it should be a matter of record what his understanding was in assessing these penalties.

JUDGE GIESEY: If he has something more, it would be interesting to hear. He has already given us about everything there is to give us about his own personal understanding of the Statute, as far as it is concerned, and he's informed you that its irrelevant because the Department hasn't taken a position on it as yet.

MR. POWER: The Statute does make provision for the use of these particular funds and I do think that Mr. Williams' understanding of the potential use of those funds is very relevant in assessing the potential bias, in connection with bias, in making those assessments.

JUDGE GIESEY: Without having Mr. Williams' answer that is entirely possible. Even though it—he doesn't say [143] it, its entirely possible that Mr. Williams has visions of having 150 more employees all paid for by the monies spilled into the coffers of the Labor Department by Jerrico, Inc., not whether this is a possibility or a probability, its a matter of law, and your position on this subject is also a matter of law. If your position is correct, it doesn't make any difference whether

Mr. Williams has the same understanding that you do, as you urge, I mean, if your position is correct.

MR. POWER: I think a distinction can be made, Your Honor, between Mr. Williams' understanding of the law and the application of the fund and your own. For instance, the Administrative Legal Procedures. I think its entirely possible that the Statute would be interpreted in such a way that the matter, that knowledge was not known to the man making the assessment, but he had no knowledge of the possible intent for use of those funds.

JUDGE GIESEY: Oh, in that case, Mr. Power, you're home free already. Mr. Williams has already testified that he has full knowledge of the potential use of these funds; like most civil servants he's not really sure that his Employer is going to do what Congress appears to have told him to do.

MR. POWER: The only distinction I make, Your Honor, I think I am not going to pursue it with any more vigor, but the only point I am trying to ascertain for the record is whether or not he had knowledge at the time he made this [144] particular assessment.

MR. HAYNES: He's testified as to what he knew and what he did at the time he made the assessment. I don't see any point in belaboring it at this time.

JUDGE GIESEY: I would be very surprised if he didn't have complete knowledge as to the terms of the Statute. There are a lot of sophisticated opinions as to what they mean too. There are.

MR. POWER: May I put that particular question to him?

JUDGE GIESEY: Surely.

MR. POWER: Did you hear the question the Judge asked?

JUDGE GIESEY: I didn't ask a question.

MR. HAYNES: This is pure argument.

JUDGE GIESEY: That's right. But the question, Mr. Williams, is at the time you assessed this penalty, were you acquainted with the particular terms of the Statute to which Mr. Power has referred?

THE WITNESS: I take it for granted I was. I cannot pinpoint the date by the calendar when I was specifically aware of the statute provisions. I am confident this was no factor in the Jerrico assessment.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 79-253

RAY MARSHALL, Secretary of Labor, ET AL., APPELLANTS

v.

JERRICO, INC.

Appeal from the United States District Court
for the District of Columbia

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 13, 1979

Mr. Justice Marshall took no part in the consideration or decision of this matter.

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Supreme Court, U. S.
FILED
OCT 17 1979
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79 - 253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and order of the district court be affirmed on the ground that the decision of the district court is so obviously correct under the principles established by this Court in *Tumey* v. *Ohio*, 273 U.S. 510 (1927) and *Ward* v. *Village of Monroeville*, 409 U.S. 57(1972), as to warrant no further review by this Court.

OPINION BELOW

The memorandum opinion and order of the district court are not yet reported, but are set forth in Appendix B of appellants' jurisdictional statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement.

QUESTIONS PRESENTED

1. Whether section 16(e) of the Fair Labor Standards Act (hereinafter referred to as the Act), which requires civil penalties for violations of the Act's child labor provisions, violates the due process clause of the fifth amendment because it mandates sums collected as civil penalties to be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties.

2. Whether, if the provision of section 16(e) relating to the use of civil penalty funds violates due process, that provision is severable from the remainder of the section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the fifth amendment to the United States Constitution, and of the Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.*, are set forth in the appellants' jurisdictional statement.

STATEMENT

Appellee takes issue with four representations made in appellants' statement of the case in its jurisdictional statement. The Solicitor General characterizes the hearing provided by section 16(e) and its implementing regulations as a *de novo* review of the child labor civil money penalty assessment. The Department of Labor in the administrative proceeding in the case at bar argued forcefully that:

> "The exception permitted by Section 16(e) is expressly limited to whether the violations for which the penalty is imposed actually occurred. This defines the scope of the matter to be heard by the ALJ and he cannot consider matters outside the scope."
>
> (Brief for the Secretary of Labor-Post Hearing and in Support of Proposed Decision and Order, at 32.)

Addressing the implementing regulations, the Department of Labor further stated that:

> "Section 580.2 tracks the language of the Act, limiting the exception 'to the determination that the violations for which the penalty is imposed occurred.' "
>
> (*Ibid*)

The Solicitor General's characterization is obviously at variance with the Department of Labor's position.

Appellee further questions the Solicitor General's contention that:

> "Under the statutory scheme, the amount of monies collected as child labor penalties does not affect the compensation of any official involved in the assessment of those penalties or the investigation of the underlying violations."
>
> (Jurisdiction Statement at 6)

This statement does not properly reflect the potential for bias inherent in the statutory scheme mandated by section 16(e). Appellants have offered no proof that section 16(e) penalties were not or could not be used to directly benefit involved Department of Labor officials in terms of over-

time compensation; additional support personnel; travel funding; more favorable consideration for promotions and other career advancement; and the like. These benefits are authorized by section 9(a) and conceded in practical terms by appellants at page 7 of their jurisdictional statement.[1]

Appellee notes that the Solicitor General has provided the amounts of penalties collected during the first three years section 16(e) was enforced as an indication of the scope of the section's impact. A more meaningful statistic is the amount of civil money penalties assessed, which total Three Million One Hundred Thirty-Three Thousand Nine Hundred Eighty-Six Dollars ($3,133,986), hardly an insubstantial amount.

Finally, appellee believes that the Solicitor General's assertion that the court below

> "... acknowledged that the assessment of penalties by the assistant regional administrator is subject to a *de novo* determination by an administrative law judge, that the Office of Administrative Law Judges receives no allotment of any portion of the child labor penalties, and that there is thus no due process violation at the administrative law judge level (App. B, *infra*, 10a)."
>
> (Jurisdictional Statement at 9)

---

[1] "In other words, while it is *theoretically possible* for the challenged provisions of 29 U.S.C. 216(e) and 9(a) to increase the monies available to ESA in a fiscal year beyond those appropriated to it by Congress, they have never had that effect."

(Jurisdictional Statement at 7)
(Emphasis Added)

misstates that court's action. The language in the district court's opinion on which the Solicitor General relies does not support an assertion that *de novo* review is available. Nor does the opinion support appellants' contention that there is no due process violation at the administrative law judge level. The district court merely cited the Department of Labor's contentions as to the administrative law judges and then moved on to the clear bias it perceived at the "basic level of dispute resolution" which, regardless of any findings as to the administrative law judges, required a holding that due process had been violated.

ARGUMENT

The appellants, Ray Marshall, Secretary of Labor, *et al.*, appeal from a decision of the United States District Court for the District of Columbia declaring that section 16(e) of the Fair Labor Standards Act, 29 U.S.C. § 216(e) (1976), which provides that sums collected as civil penalties for violations of the Act's child labor provisions shall be applied toward reimbursement of the costs of determining violations and assessing and collecting such penalties, violates the due process clause of the fifth amendment of the United States Constitution.

In his jurisdictional statement the Solicitor General makes a full and, appellee believes, exhaustive argument for reversal by this Court of the district court's decision. In support of their position appellants make four assumptions all of which appellee contends are factually and legally incorrect. These four assumptions are summarized as follows:

1. That section 16(e) of the Act which authorizes civil penalties for violations of the Act's child labor provisions *permits but does not require* sums collected as civil penalties to be applied toward reimbursement of the cost of enforcing the child labor laws.

2. That the district court has improperly applied to officials exercising a purportedly prosecutorial function the standards of impartiality that this Court has applied to officials exercising judicial or quasi-judicial functions.

3. That the actual use of civil money penalties for child labor violations in the past and the potential use of civil money penalties collected in the future, to reimburse the bureau, service, office, division, or other agency of the Department of Labor the cost of determining the violations and assessing and collecting such penalties falls far short of creating the substantial risk of bias that violates the due process clause of the fifth amendment to the United States Constitution.

4. That the potential for bias, the appearance of bias, and actual bias can be cured and the intent of Congress can be discerned and achieved by severing the reimbursement provision of section 16(e) from the remainder of that section, thus requiring the Department of Labor to enforce the child labor laws using some other source of funds.

I. Reimbursement Of Costs Is Mandatory

The Solicitor General in his jurisdictional statement filed in this case represents the question presented as:

> "Whether Section 16(e) of the Fair Labor Standards Act, which authorizes civil penalties for violations of the Act's child labor provisions, violates the Due Process Clause of the Fifth Amendment because it *permits* sums collected as civil penalties to be applied toward reimbursement of the costs of enforcing the child labor laws."
>
> (Jurisdictional Statement at 2)
> (Emphasis Added)

This is a misleading statement of the question presented. Section 16(e) affords no discretion to the Secretary of Labor as to the use of sums collected as civil penalties. Such sums "shall be" applied toward costs of enforcing the child labor laws. Section 16(e) mandates that sums collected as civil penalties be deposited to the credit of the appropriation of the division or office of the U.S. Department of Labor which supervised, determined, assessed, and collected the involved penalties.

Accordingly, in the context of the investigation of appellee, Jerrico, Inc., for alleged violations of the child labor regulations contained at 29 C.F.R. 570.35(a), reimbursement was required to be made to the Department of Labor Regional Office in Atlanta, Georgia, which supervised the investigation of Jerrico, Inc. and which assessed

the involved penalty; to the Solicitor's Office in Nashville, Tennessee, and in Washington, D.C. for the prosecution at both the administrative and district court level of Jerrico, Inc.; and to the Office of Administrative Law Judges of the U.S. Department of Labor which conducted the administrative hearing in this matter.

Whether sums were actually paid to these offices is inapposite. Section 16(e) mandates such payment, creating a clear expectation of payment for involved officials, and is therefore an unconstitutional biasing influence on the determination of child labor violations and the assessment and collection of civil money penalties.

Section 16(e) provides:

> "... [S]ums collected as penalties pursuant to this section *shall be applied* toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with § 2 of the Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9(a))"
>
> (Emphasis Added)

The language of 29 U.S.C. 9(a) referred to in section 16(e) states:

> "All moneys hereinafter received by the Department of Labor in payment of the cost of *such work shall be deposited to the credit of the appropriation* of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and *may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency* and/or to secure the special services of persons who are neither officers nor employees of the United States.
>
> (Emphasis Added)

The language of section 16(e) is capable of only one construction; the U.S. Department of Labor, which is empowered to determine, assess, and collect civil money penalties for violations of the child labor laws and regulations, must use such funds to meet their expenses in conducting such activities. Such clear unequivocal language which affects every involved office and division of the U.S. Department of Labor in the context of civil penalty assessments violates the due process clause of the fifth amendment to the United States Constitution, whether penalties are collected or not and whether funds collected are used as required by the Act or not. This is because the language of section 16(e) itself creates the appearance of the bias and the potential for bias. Assessors of penalties have the right to expect that penalties assessed and collected will be used to reimburse them for their cost of assessment in accordance with section 16(e).

On first impression, the reference in section 16(e) to section 9(a), including the title of the Act which includes section 9(a) (an Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes), gives the self-reimburse-

ment provisions of section 16(e) a false air of legitimacy in two respects. First, reference to an existing Act of Congress ordinarily indicates that the same procedures and language have been utilized. Second, the particular language of the Act referenced implies that the sums collected as civil money penalties will in some way be used in a non-biasing manner; for example, statistical studies on child labor. In point of fact, by incorporating only section 9(a) into section the Secretary of Labor is ordered to credit any sums collected as child labor civil money penalties to the appropriation of involved offices and divisions of the Department of Labor involved in determining, assessing, and collecting such sums. Section 9(a) further grants authority to the Secretary of Labor to utilize these funds:

> "... notwithstanding any other provisions of law for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States."
>
> (29 U.S.C. 9(a))

As the district court noted in its decision below:

> "This procedure [reimbursement of expenses incurred] is perfectly suitable to the context for which it was originally enacted, that is, the conducting of studies by the Department of Labor, which has greater resources and capacity to conduct such studies than most private entities. The transplanting of such a scheme, however, to the context of assessment of civil money penalties, which involves important rights of alleged violat-

> ors of the child labor laws, creates a situation in which bias may creep into the decision of the regional officials who impose those penalties."
>
> (Jurisdictional Statement, App. B at 12a)

The Solicitor General does not dispute the uniqueness of this scheme of reimbursement, citing no comparable provision. As the district court correctly stated:

> "Section 16(e) is unique in the constellation of federal statutory procedures. No other statute provides for the crediting to enforcing agencies of civil money penalties assessed against violators."
>
> (*Id.* at 11a)

By way of contrast, another statute enforced by the U.S. Department of Labor, the Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*), contains a civil money penalty provision at section 666(k) which provides:

> "(k) Civil penalties owed under this chapter *shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States* and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office."
>
> (Emphasis Added)

This constitutionally appropriate civil money penalty procedure was enacted by Congress approximately four years

before section 16(e) was added to the Fair Labor Standards Act. As the district court reasoned in its decision below:

> "The more appropriate procedure is simple and constitutionally sound: pay all civil money penalty funds directly into the Treasury of the United States. To allow only the Department of Labor to deviate from such a clear procedural alternative, to the detriment of alleged violators, would be to disregard the fundamental tenets of our legal system."
>
> (Jurisdictional Statement, App. B at 11a)

The Solicitor General argues, however, that an examination of the actual distribution within the U.S. Department of Labor of sums collected as civil money penalties is necessary in order to determine whether

> " ... the statutory scheme creates a sufficient risk of personal bias to violate due process."
>
> (Jurisdictional Statement at 11)

Appellee disagrees with the need for, or relevancy of, this examination since the clear and unequivocal mandatory language of section 16(e) creates a potential for and appearance of bias in violation of the due process clause. While it may be argued that the Court has ordinarily reserved a declaration of "facial" unconstitutionality for first amendment cases (*see, e.g. NAACP* v. *Button*, 371 U.S. 415, 438 (1963)), an egregious violation of fifth amendment due process has been declared facially unconstitutional in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). The due process violation created by section 16(e) is as clear, unequivocal and incapable of being cured as that

found in *Aptheker* and should be struck down in the same manner.

The standard for review in instances of due process bias has been enunciated by this Court in a consistent line of authority. *Tumey* v. *Ohio*, 273 U.S. 510 (1927) is the seminal case on the issue. The Court there stated the test as:

> " ... whether the ... situation is one which would offer *a possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused."
>
> (*Id.*, at 532.)
> (Emphasis Added)

This due process principle was restated in *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57 (1972), wherein the Court held that:

> " ... *possible temptation* may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a *'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial,* [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.' *Id.* [273 U.S.] at 534, 47 S. Ct., at 445."
>
> (*Id.*, at 60.)
> (Emphasis Added)

Unlike *Ward* and *Tumey*, in the instant case there is no need for this Court to examine the actual system of reimbursement, no need for the Court to determine whether the fines were used to pay the salary of the judges, or whether the executive responsibilities of the mayor, in fact, conflicted with his judicial responsibilities. Here the language of the Act mandates that the penalties collected be used to reimburse the costs of assessing and collecting such penalties. Surely those costs include the salaries of the officials assessing the fines.

There is no limitation of what costs are to be reimbursed. To the contrary, there is even express authority given to the Secretary to use the penalties to secure the special services of persons who are neither officers nor employees of the United States. Unless this court affirms the decision of the district court, the clear and unequivocal language of section 16(e) requires the Secretary to use penalties collected to reimburse the salaries of the assessors of penalties to the extent the penalties are available. Whether he in fact uses the penalties in this manner or not is immaterial.

In a slightly different context, this Court specifically noted in the case of *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) the applicability of this due process standard to administrative proceedings like those at issue herein. This Court has always been vigilant to insure that procedures in our government comport with the notions of fairness inherent in due process of law.

Perhaps the most succinct statement of this due process standard is Justice Frankfurter's admonition that "Justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954), *applied in Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971) and in *In re Murchison*, 349 U.S. 133, 136 (1955). Appellee seeks no more than a restatement of these principles as they apply to

section 16(e). Despite the Solicitor General's attempts to obscure the issue, the clear requirements of section 16(e) compel this Court to dismiss this appeal as presenting no substantial issues of law or fact.

The Court in *Tumey* ruled that the involved reimbursement procedure violated due process in two respects. First, the Court found that the mayor had a pecuniary interest in the result of this judgment. (*Tumey*, *supra* at 532). Second, the Court ruled that the mayor's executive responsibilities placed the mayor in two inconsistent positions, as judge and administrator. (*Id.*, at 533-34).

Both grounds for the Court's decision in *Tumey* are equally applicable in this case. The mayor in *Tumey* may here by analogized to the Secretary of Labor and his delegates; the Secretary and his delegates have a pecuniary interest in child labor civil money penalties assessed and collected, and these same individuals occupy both administrative and judicial capacities in the context of determining, assessing, and collecting child labor civil money penalties. A clearer example of the creation of bias, or the appearance of bias than section 16(e) is difficult to imagine.

The Solicitor General, instead of arguing to these substantive issues or disputing the plain meaning of section 16(e), relies on his representation that the reimbursement scheme of section 16(e) is essentially permissive and argues that any potential for bias inherent in section 16(e) is remote (Jurisdictional Statement at 16-19). As set forth more fully below, the prospects for reimbursement of expenses and costs mandated by section 16(e) are direct and substantial.

Moreover, the argument of the Solicitor General fails to address what is perhaps the most important part of the

tripartite test enunciated by this Court in *Tumey*, the appearance of bias. The appearance of bias can be no more readily apparent than it is on the face of section 16(e), which states that penalties collected *shall* be applied toward the costs of determining the violations and assessing and collecting such penalties. Justice Frankfurter's admonition regarding the "appearance of justice" is blatantly disregarded in section 16(e). The Court's long-standing commitment to the appearance of justice requires the affirmance of the decision of the district court that section 16(e) is unconstitutional.

II. Standards Of Impartiality For Officials Exercising Judicial Functions Were Not Improperly Applied

Section 16(e) requires that sums collected as civil penalties for child labor violations shall be used to reimburse the bureau, service, office, division, or other agency of the Department of Labor for the cost of determining the violations and assessing and collecting such penalties. Section 16(e) permits a person charged with a violation to take exception within fifteen (15) days after receipt of notice thereof to the determination that the violation for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5 of the United States Code and regulations promulgated by the Secretary. Under the regulations promulgated by the Secretary, this administrative hearing is conducted by the U.S. Department of Labor, Office of the Administrative Law Judges.

Section 16 (e) clearly requires that this office of the Department of Labor be reimbursed for the cost of determining child labor violations and assessing and collecting such penalties to the extent that such sums are available. The fact that penalties in the instant case were not in fact used to reimburse the Office of the Administrative Law Judges is immaterial. Unless this Court affirms the unconstitutionality of section 16 (e), penalties collected in the future can and must be used to reimburse such costs. Surely, the standards of impartiality that this Court has applied to officials exercising judicial functions must apply to an administrative law judge at a hearing held in accordance with section 554 of title 5 of the U.S. Code.

In the case at bar, the Assistant Regional Administrator in Atlanta assessed civil money penalties against appellee in excess of $100,000, which was nearly the maximum that could have been imposed under the statute. For fiscal year 1977, the year following the initial imposition of penalties in this case, the Regional Office in Atlanta was allotted $39,200 as its pro rata share of total penalties received. (Jurisdictional Statement at 8-9)

Section 16 (e) requires that the Secretary of Labor, and thus his delegate, the Assistant Regional Administrator, in determining the amount of penalties, shall consider the appropriateness of such a penalty to the size of the business of the person charged and the gravity of the violation; clearly a judicial, not a prosecutive, function. Regulations promulgated by the Secretary further requires that consideration be given, among other things, to any history of prior violations; and, any evidence of willfulness or failure

to take reasonable precautions to avoid violations (29 C.F.R. 579.5(c)). Here again these are judicial, not prosecutive, functions.

Section 16 (e) further provides that the determination of the Administrator is final unless a person charged with a violation takes exception within fifteen days after receipt of notice thereof to the determination that the violation for which the penalty is imposed occurred. Again a judicial, not prosecutive, function.

Certainly the standards of impartiality that this Court has applied to officials exercising judicial functions must apply to the Assistant Regional Administrator who in the instant case is charged with the responsibility to determine the amount of the penalties and was required to consider the gravity of the violation, any history of prior violations, any evidence of willfulness or failure to take reasonable precautions to avoid violations and whose decision is final absent an exception within fifteen (15) days after notice of an alleged violation by the person charged.

The Solicitor General argues that Assistant Regional Administrators are not adjudicators and in assessing civil money penalties they are not acting in a judicial or quasi-judicial capacity and that they are exercising what is in effect a prosecutive function. (Jurisdictional Statement at 12) This, simply stated, is not so. Prosecutors do not assess penalties. Prosecutors are not required by statute to weigh the penalty against the gravity of the violation or against evidence of willfulness. Prosecutors' decisions are not final. Such functions are those of a judge, not a prosecutor.

The Solicitor General further argues that the finality of the Assistant Regional Administrator's order is not significant in determining whether a child labor penalty assessment is a judicial function. He argues that the employer's failure to file exceptions constitutes a consent to the assessment and is no different than a defendant's failure to contest a criminal charge filed in a court by a prosecutor. (Jurisdictional Statement at footnote 10)

However, a prosecutor does not set the penalty for an uncontested charge. Penalty assessments are the function of a judge, and it is precisely that function, influenced by the potential for an actual receipt of reimbursement through civil money penalties, which is being challenged in the instant case. If the Assistant Regional Administrator's responsibility was limited to an investigation as to whether the violations had occurred, with a determination as to the amount of the penalty to be made by an impartial judge, the Administrator's role could be likened to that of a prosecutor. This was not the fact in the instant case.

The Solicitor General admits that there unquestionably are constitutional limits to the discretion and partisanship permitted of prosecutors. (Jurisdictional Statement at 15) Surely the reimbursement scheme of section 16(e) exceeds such limits. The Solicitor General cites *Withrow v. Larkin*, 421 U.S. 35 (1975) for the proposition that government attorneys may have at least some interest in the success of their cases. While *Withrow* did reject a due process claim in an instance where members of an administrative agency had both investigatory and prosecutorial functions, there was no evidence of bias or the risk of bias presented in that case. The case is, therefore, distinguishable in at least one significant respect—the

Assistant Regional Administrator here had an expectation of, and was in fact reimbursed for, his investigatory and judicial functions pursuant to section 16(e).

When this combination of activities is coupled with reimbursement from penalties collected, the apppearance of and potential for bias are unquestionably present. Moreover, the actual prosecutive arm within the Department of Labor is the Solicitor's Office. It should be noted that the Solicitor's Office received in excess of $200,000 in child labor civil money penalties as reimbursement for their costs of determining, assessing, and collecting child labor penalties.

Similarly, there must be some constitutional limit to the discretion and partisanship even of public officials performing an investigatory function. Could a law constitutionally provide that all fines collected for traffic violations shall be paid over to police officers issuing traffic citations even though an unbiased judge was available to hear traffic cases? Clearly, the answer is no. "Justice must satisfy the appearance of justice," *Offutt* v. *United States supra*, at 14. Under the reimbursement scheme of section 16(e), penalties collected must be used to reimburse the cost of the work of Compliance Officers of the Department of Labor for investigating, uncovering and charging child labor violations. How is such a scheme different from the payment of all fines collected for traffic violations to the police?

III. Child Labor Penalties Have Created and Will Continue To Create A Substantial Risk of Personal Bias

It is argued, even if the standard enunciated in *Tumey* and *Ward* is applicable to the civil penalty assessment stage of section 16(e), that the due process determination turns on whether the alleged influencing factor is sufficiently proximate and substantial to create a significant risk of bias.

In his jurisdictional statement at page 16, the Solicitor General notes this Court's distinction between *Dugan* v. *Ohio*, 277 U.S. 61 (1928) and *Ward*, *supra* 60-65, in that the mayor in *Dugan* had "no executive and exercised only judicial functions" *Dugan* at 63, and since "he receives his salary in any event whether he convicts or acquits." *Id.*, at 65. This Court held in *Dugan* that the mayor's relations to the city's "executive or financial policy" was too "remote" to impute bias to him in his capacity as judge. The facts in *Dugan*, however, can be readily distinguished from the facts in the instant case. The mayor in *Dugan* was not reimbursed for his cost of determining the violations and assessing and collecting the penalties as is required under section 16(e).

The test for remoteness as stated in *Tumey* citing Mr. Justice Cooley's work on Constitutional Limitations is that the:

> ". . . interest is so remote, trifling and insignificant that it may fairly be supposed to be incapable of

affecting the judgment of or of influencing the conduct of an individual."

(*Tumey* at 531)

The Court goes on to cite *Bonham's Case*, 8 Coke, 118 and other English precedent for the proposition that:

> " . . . [it] is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable."
>
> (*Id.* at 524)

The only exception to this test is where the costs are so small that they can be properly characterized as within the maxim *de minimis non curat lex*. (*Id.* at 531)

The Solicitor General argues that no Employment Standards Administration (ESA) official responsible for assessing child labor penalties has a personal financial stake in his decision and that there is no allegation that sums collected as civil penalties increase the salaries of the administrators who assess them. (Jurisdictional Statement at 17) This argument ignores the fact that the clear statutory language of section 16(e) anticipates the use of penalties to pay the salaries of assessors.

Section 16 (e) requires that the penalties shall be used to reimburse the cost of determining the violations and assessing and collecting such penalties in accordance with the provisions of section 9 (a) of this title. Section 9 (a) in turn requires that the sums collected be deposited to the credit of the appropriation of the office within the Department of Labor which supervised the work.

Section 9 (a) further grants the Secretary of Labor discretion in using such funds

> "notwithstanding any other provision of law for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States."

Surely, the cost to be reimbursed includes the cost of salaries. Even if the Secretary did not in fact use the penalties to reimburse salaries, that fact is immaterial.

Further, the fact that other laws or regulations may have prohibited the use of penalties to directly reimburse salaries does not correct the potential for bias and the appearance of bias contained in the express statutory language of section 16 (e) which provides that the Secretary shall not be bound by such other laws or regulations.

The Solicitor General also argues that Assistant Regional Administrators have no budgetary functions, and that penalties recovered do not accrue directly to their offices. (Jurisdictional Statement at 17) This argument ignores the fact that the Assistant Regional Administrator of the Atlanta Region who initially assessed appellee's penalties participated directly in a conference of the Department of Labor's administrators and officials subsequently recorded as follows:

> " 'ACTION ITEMS DEVELOPED AT WAGE AND HOUR AREA CONFERENCE, WILLIAMSBURG, VA
> (DECEMBER 15-17, 1976)'

'4. Prepare formula for allocation of major portion of CL-CMP's (Child Labor-Civil Money Penalties) collected to the regions for furtherance of CL compliance efforts.' "

(Defendants' Answers to Plaintiff's Interrogatory No. 7 at Exhibit D.)

In light of the clear requirements of section 16 (e) mandating that penalties collected be applied to the reimbursement of the cost of assessing the penalties, the budgetary responsibilities of the assessor of the penalties is immaterial. The assessor has every right to expect that his cost of assessing penalties will be received from penalties assessed irrespective of the normal budgetary process.

The Solicitor General argues that the civil money penalties *collected* constitute a minute fraction (less than 1%) of the ESA's national budget. (Jurisdictional Statement at 17) The more relevant information is the penalties *assessed* rather than collected, particularly because under the reimbursement scheme adopted by the Department of Labor, the share allotted to the assessor depended not upon collections, but upon the amount of money expended in investigation and making assessments.[2]

[2]The U.S. Department of Labor confirmed that such a procedure was in fact being used, stating: "Funds were allocated and distributed to the bureaus, offices, services, or divisions identified in answer no. 2(c) hereof for the purpose of reimbursement of child labor obligated funds. Field allottments were made in pro rata distribution based on total obligations incurred in connection with child labor enforcement. National Office allottments were made as reimbursements of costs for administration. Transfer of funds to the Office of the Solicitor was reimbursement for costs incurred in litigation of child labor matters."
(Defendant's Answers to Plaintiff's Interrogatory No. 2(d)).

The low level of collections during the first three-year period following implementation of section 16(e) does not indicate what is to be expected in the future. Obviously, as in any bureaucratic system, the first few years of any program designed to generate revenues will be the lowest in terms of revenues actually received. While collections amounted to One Hundred Fifty-One Thousand Dollars ($151,000) (FY 76), Six Hundred Fifty Thousand Dollars ($650,000) (FY 77), and Five Hundred Ninety-Two Thousand Dollars ($592,000) (FY 78), the Department of Labor noted in its Motion to Stay the decision of the district court filed on May 17, 1979 that Two Million Six Hundred Thirty-Four Thousand Three Hundred and Eleven Dollars ($2,634,311) was then pending collection, a clear indication of the growth of the program to be expected.

The Solicitor General suggests that Assistant Regional Administrators charged with the assessment of civil money penalties may not have been aware of the reimbursement provisions of section 16(e). (Jurisdictional Statement at 18) It is inconceivable that any official charged with the responsibility of assessing civil money penalties of up to One Thousand Dollars ($1,000) per child labor violation under section 16(e) would be unaware of the reimbursement provision contained in the same section of the law.

In the instant case, the Assistant Regional Administration not only clearly indicated his awareness of the reimbursement provision[3], but also joined with other Assistant Regional Administrators of the ESA to discuss ways

[3]Deposition of Sterling B. Williams, Assistant Regional Administrator at 8—10 (January 5, 1977).

and means to fairly allocate the proceeds of their child labor investigatory and assessment activities. (Defendant's Answers to Plaintiff's Interrogatory No. 7 at Exhibit D)

In analyzing the scheme adopted by ESA for the allocation of child labor penalty funds to its Regional Offices, the Solicitor General makes a distinction between allocation in proportion not to the level of penalties initially assessed by those offices, but to the amount of money expended in investigating and prosecuting child labor violations. (Jurisdictional Statement at 18) This distinction ignores the fact that the statutory language of section 16(e) would properly permit reimbursement of penalties on either basis. Moreover, the potential for bias and appearance of bias is substantial under either allocation scheme. The amount of penalties assessed is the only practical way of measuring the effectiveness and prudence of spending time and money in investigating and prosecuting child labor violations.

As pointed out by the district court:

> "Costs of enforcing the child labor laws *e.g.*, investigations and ultimately penalty assessments, are, of course, directly related to the amounts assessed in penalties. Greater effort in uncovering violations and fining the violators leads to greater amounts of penalties assessed. Thus, the increased costs of such effort leads to the crediting of a larger share of reimbursements. The Court is persuaded that this direct and tangible relationship between reimbursement and assessment is violative of due process."
>
> (Jurisdictional Statement at 8 a)

Reimbursement on the basis of monies expended in investigating and assessing penalties would seem more susceptible to bias than reimbursement on the basis of actual collection. The scheme adopted by the Department of Labor for reimbursement rewards the aggressive assessor irrespective of the validity of his assessments. In the instant case, the Assistant Regional Administrator assessed against appellee One Hundred Three Thousand Dollars ($103,000) in civil money penalties and received from ESA for the year of the assessment Thirty-Nine Thousand Two Hundred Dollars ($39,200) as his *pro rata* share of the total penalty funds received. *(Id.* at 9 a) This constitutes two and one-half times the average share allocated to each of the Regional Offices. *(Ibid.)*

The fact that the administrative law judge subsequently reduced the assessment from One Hundred Three Thousand Dollars ($103,000) to Eighteen Thousand Five Hundred Dollars ($18,500) did not result in a reduction of the share allocated to the Atlanta Regional Office. Thus, in the instant case it would appear that the decision of the Atlanta Regional Office to spend the money investigating the payroll records of appellee with its undisputed workforce in excess of Eight Thousand Five Hundred (8,500) persons, and the assessment of One Hundred Three Thousand Dollars ($103,000) as a tangible measure of the prudence of such an investigation, obviously increased the allocation of the assessing official's office. Such a direct and clear relationship between assessment of fines and reimbursement creates a substantial risk of personal bias, clearly in violation of the due process test as enunciated in *Tumey* and *Ward.*

IV. Severence Of The Reimbursement Provisions Of Section 16(e) Will Not Cure The Appearance Of Bias, The Potential For Bias And Will Not Effect Congressional Intent.

The Solicitor General argues that the reimbursement provision of section 16 (e) is merely "incidental" to the congressional purpose in enacting the section and asks this Court to sever that reimbursement language to allow the remainder of section 16(e) to be given full force and effect. (Jurisdictional Statement at 19) Appellee maintains that severence is not appropriate inasmuch as such a step would not cure the bias here at issue nor would the separation of these provisions comport with the intent of Congress.

The biasing nature of section 16 (e) is intrinsic in the language of the section, having its effect on any one who would read the statute. Even if this Court were to sever the provisions of section 16(e) relating to penalty reimbursement, allowing the remainder of the section to be enforced, the biasing influence of the statutory language would still affect all who read the section. There is absolutely no method or means to strike down the reimbursement provision judicially and cure the appearance of bias or the potential of bias that lies within the language of the section. Only legislative action can cure this constitutional defect.

It is clear from a reading of the language of the section that Congress intended that child labor enforcement activities, and especially any increased child labor enforcement activities, were to be funded by reimbursement of the cost of such efforts from the penalties assessed. If that funding mechanism were removed, only speculation can be substituted as to what Congress might have ordained as to the maximum amount of the civil money penalties which could be assessed and the method by which current or increased child labor enforcement was to be funded.

Severence will not lie where that act would cause results not contemplated, desired, or intended by the Congress.

Implied within the Solicitor General's argument is the concept that if this Court severs the reimbursement provisions of section 16 (e), the civil money penalties collected will go to the U.S. Treasury. But how is it clear that this Court's severence of the reimbursement provision of section 16 (e), and its declaration that the reimbursement provision is unconstitutional, will result in civil money penalties being paid directly into the Treasury of the United States[4] or that Congress intended such a result? Certainly, it is conceivable that Congress would prefer to earmark the funds for other lawful purposes related to the problems of child labor.

The Solicitor General has maintained that there is "strong evidence" that Congress would have enacted section 16 (e) without the reimbursement provision rather than have no civil penalties enforcement system at all. (Jurisdictional Statement at 20) The only support offered for this contention is the general severability provision of the Act and the Solicitor General's analysis of the legislative history, which in fact contains no reference to the reimbursement provision at all. The characterization of such meager support as "strong evidence" of congressional intent strains credulity.

Assuming *arguendo* that severence is appropriate, appellee maintains that the injunction issued by the district

[4]Affidavit of Assistant Administrator Wage and Hour Division, ESA, U.S. Department of Labor, filed with appellants' Motion to Stay on May 17, 1979, indicates only that all monies collected on and after May 7, 1979 pursuant to section 16(e) are to be held in *escrow* and deposited in an account with the United States Treasury until final judicial determination and resolution of the legal issues in the instant case.

court should remain in full force and effect since payment of penalties already assessed or collected into the Treasury of the United States would do nothing to correct the bias, the potential for bias, and the appearance of bias in the procedure as found by the district court. Only actual notice of this Court's decision to sever and declare the reimbursement provision unconstitutional to all Department of Labor officials affected by the provisions of section 16(e) could eliminate the impermissable potential for bias inherent in section 16 (e). Appellee submits that neither certitude of such actual notice to involved officials nor removal of the appearance of bias created by section 16 (e) remaining in official and unofficial texts of the Act can be achieved by this Court's severence of the reimbursement portion of section 16 (e).

CONCLUSION

On the basis of the foregoing argument, the appellee's Motion to Affirm should be granted. If, however, the Court decides to deny appellee's Motion to Affirm on the basis of the arguments and evidence presented, appellee's contentions are of sufficient merit and consequence to warrant full briefing by the parties and argument before the Court. We would so request such an opportunity be granted.

Respectfully submitted,

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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27 C.J.S., *District & Prosecuting Attorneys* (1959) 22
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2 K. Davis, *Administrative Law Treatise* (1958) 14
36 Fed. Reg. 8755 (1971) 5
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court (J.S. App. 3a-13a) is not yet reported. The decision and order of the administrative law judge (J.S. App. 16a-28a) is not reported.

JURISDICTION

The judgment of the district court was entered on May 7, 1979 (J.S. App. 1a-3a). A notice of ap-

peal to this Court was filed on May 17, 1979 (J.S. App. 14a-15a). On July 12, 1979, the Chief Justice extended the time for docketing the appeal to and including August 15, 1979. The jurisdictional statement was filed on that date, and this Court noted probable jurisdiction on November 13, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether Section 16(e) of the Fair Labor Standards Act, which authorizes civil penalties for violations of the Act's child labor provisions, violates the Due Process Clause of the Fifth Amendment because it permits sums collected as civil penalties to be applied toward reimbursement of the costs of enforcing the child labor laws.

2. Whether, if the provision of Section 16(e) relating to the use of civil penalty funds violates due process, that provision is severable from the remainder of the section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law* * *.

Section 16(e) of the Fair Labor Standards Act, 29 U.S.C. 216(e), provides in pertinent part:

> Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. * * * Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title.

29 U.S.C. 9a provides:

> All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law,

for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States.

STATEMENT

1. Section 12 of the Fair Labor Standards Act, 29 U.S.C. 212, prohibits the employment of "oppressive child labor," as defined in the statute and the regulations promulgated by the Secretary of Labor under 29 U.S.C. 203(*l*). The Secretary may obtain injunctive relief to enforce this prohibition (29 U.S.C. 212(b), 217), and any person who willfully employs oppressive child labor may be subjected to criminal sanctions (29 U.S.C. 216(a); see 29 U.S.C. 215(a)(4)). Moreover, since 1974—when Congress amended the Act by adding Section 16(e)—the Secretary may assess a civil penalty of not more than $1,000 for each violation of Section 12 or the implementing regulations. Section 16(e) directs the Secretary, in determining the amount of the penalty, to consider "the size of the business of the person charged and the gravity of the violation * * *" 29 U.S.C. 216(e).

When the Secretary or his delegate assesses a penalty for child labor violations under Section 16(e), the employer has a right under the statute to file exceptions to the assessment. 29 U.S.C. 216(c). If an exception is not filed within 15 days of the Secretary's assessment, the assessment is deemed final. 29 U.S.C. 216(e). If an exception is filed, however, the existence of the violation and the amount of the

penalty are determined de novo by an administrative law judge after a hearing conducted pursuant to the Administrative Procedure Act (5 U.S.C. 554). 29 U.S.C. 216(e). In the de novo proceeding before the administrative law judge, the Secretary bears the burden of proof on contested issues of fact (29 C.F.R. 580.21(a)). The administrative law judge may uphold or reject the charges and may impose a penalty in any lawful amount not in excess of the assessment imposed by the Secretary. 29 C.F.R. 580.32(a). The decision of the administrative law judge constitutes the final administrative decision on the matter (*ibid.*), and an employer aggrieved by that decision may thereafter obtain judicial review (5 U.S.C. 702, 704).

Section 16(e) further provides that "[s]ums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title." 29 U.S.C. 9a, in turn, provides that the sums collected "shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency [within] the Department of Labor which supervised [the] work" and that such funds "may be used, in the discretion of the Secretary of Labor," to meet the expenses of that agency.

The Secretary has delegated his responsibility for enforcing the child labor provisions of the Fair Labor Standards Act to the Employment Standards Administration (ESA). 36 Fed. Reg. 8755 (1971).

The authority to make the initial assessment of civil penalties under Section 16(e) is exercised by ESA's assistant regional administrators.

2. Appellee operates a chain of restaurants in the southeastern United States (J.S. App. 4a). In 1975, following an investigation, the ESA assistant regional administrator in the Atlanta regional office determined that appellee had committed 169 separate violations of the child labor law. He announced an assessment of $103,000 in civil penalties against appellee for these numerous violations. Appellee filed exceptions to the regional administrator's determination and assessment (*ibid.*). After a hearing, the administrative law judge concluded that the existence of the violations was clearly established, but he reduced the penalty to $18,500 (J.S. App. 27a-28a).[1]

Appellee did not seek judicial review of the administrative law judge's ruling and, indeed, has never challenged the merits of that decision. Instead, appellee filed this action in the United States District Court for the District of Columbia, seeking a declaratory judgment that Section 16(e) is unconstitutional and an injunction prohibiting its enforcement. Appellee contended that the reimbursement provision of the

[1] The assistant regional administrator had assessed a penalty of $84,500, in addition to the $18,500, because he concluded that the violations were willful. The violations were of the same type that had been discovered in several previous investigations of appellee's premises. The administrative law judge did not uphold this charge, however, ruling that it was not shown that the company had sufficient reason to know that the violations were recurring (J.S. App. 21a, 26a-27a).

statute (and, by reference, 29 U.S.C. 9a), which authorizes the allocation of civil penalty funds to the offices that investigate and assess penalties for child labor violations, creates an impermissible risk of decisional bias, in violation of the Due Process Clause.

The record developed in the district court established the following facts, which appellee did not dispute. Under the statutory scheme, the amount of monies collected as child labor penalties does not affect the compensation of any official involved in the assessment of those penalties or the investigation of the underlying violations.[2] For fiscal years 1976, 1977 and 1978, ESA collected the following approximate amounts in child labor civil penalties: $151,000 (FY 1976), $650,000 (FY 1977), and $592,000 (FY 1978).[3] In each of the three years, these amounts constituted less than 1% of the total funds appropriated to ESA by Congress.[4] Furthermore, in each of these years, ESA failed to spend the full amount appropriated to it, and the unexpended monies were returned to the Treasury. Indeed, in each year the amounts lapsed to the Treasury substantially ex-

[2] Defendants' Answer to Plaintiff's Interrogatory No. 2(h) (App. 27).

[3] Defendants' Answer to Plaintiff's Interrogatory No. 2(a) (App. 24). The fiscal year runs from October 1 to the following September 30. Although Section 16(e) became effective on May 1, 1974, no penalties were collected prior to July 15, 1975.

[4] *Budget of the United States Government, Fiscal Year 1979-Appendix*, pages 623-624; *Budget of the United States Government, Fiscal Year 1978-Appendix*, page 510.

ceeded the amounts collected in child labor penalties.[5] In other words, while it is theoretically possible for the challenged provisions of 29 U.S.C. 216(e) and 9a to increase the monies available to ESA in a fiscal year beyond those appropriated to it by Congress, they have never had that effect.

In FY 1976 ESA allotted the amounts collected in child labor penalties to the ESA national office. In FY 1977 ESA allotted the penalties to the national office, to the Office of the Solicitor of Labor, and to the several regional offices in proportion to the amounts expended by those offices on child labor enforcement. The Atlanta regional office received an allocation of $39,200 in that fiscal year.[6] In FY 1978 and FY 1979 the penalties collected by ESA were held in the Treasury.[7]

Without disputing these facts, appellee moved for summary judgment. The district court granted the motion. Relying on *Tumey* v. *Ohio*, 273 U.S. 510

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[5] Defendants' Answer to Plaintiff's Interrogatory No. 2(b) (App. 24). In FY 1976, $981,000 lapsed to the Treasury; in FY 1977, $870,000; in FY 1978, approximately $4,600,000.

[6] Defendants' Answer to Plaintiff's Interrogatory No. 2(c) (App. 25). See also J.S. App. 9a n.6. The record does not indicate whether the FY 1977 allocations served to increase the funds that would otherwise have been available to each office for expenditure in that year. Although the Department of Labor's annual appropriation specifies the amount earmarked for ESA, it does not specify the amount allotted to each of ESA's regional offices.

[7] Defendants' Answer to Plaintiff's Interrogatory No. 2(c) (App. 25).

(1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the court stated that the provision of Section 16(e) relating to the use of civil penalties "creates a situation in which bias may creep into the decisions of the regional officials who impose those penalties" (J.S. App. 12a) and that the statute is therefore invalid under the Due Process Clause (*id.* at 13a). The district court appears to have reasoned that, under the reimbursement provision of Section 16(e), an ambitious assistant regional administrator, motivated by a desire to enlarge his bureaucratic domain, would have an incentive to assess a substantial penalty for child labor violations in the expectation, or hope, that ESA would return a portion of the penalties it collected to his office. The court apparently believed that this additional funding would enable the administrator to hire more personnel for child labor enforcement and that the statute thus "tends to make [the regional] offices partisan to maintain a high level of penalty assessment" (*id.* at 8a).

The district court acknowledged that the assessment of penalties by the assistant regional administrator is not final if challenged and that if the assessment is challenged it is subject to a de novo determination by an administrative law judge. The court also recognized that the Office of Administrative Law Judges receives no allotment of the child labor penalties and that there is no risk of bias or due process violation at the administrative law judge level (J.S. App. 10a). It nevertheless concluded that this safeguard does

not purge the statutory scheme of the alleged taint, because "unfairness at the 'trial' level cannot be corrected by the existence of appeal procedures, or even by the availability of a trial *de novo*" (*ibid.*).

Finally, although the district court held that it was the reimbursement provision of Section 16(e) alone that rendered the civil penalty statute unfair, and although it stated that it would be "simple and constitutionally sound [to] pay all civil money penalty funds directly into the Treasury of the United States" (J.S. App. 12a), the court did not limit its relief to declaring unconstitutional, and enjoining the enforcement of, the reimbursement provision. Instead, it permanently enjoined appellants "from enforcing section 16(e) * * * against [appellee] and * * * from requiring the payment of civil money penalties assessed against it" (J.S. App. 1a-2a; see also *id.* at 13a).

SUMMARY OF ARGUMENT

Section 16(e) of the Fair Labor Standards Act authorizes the assessment of civil penalties against persons who employ child labor in violation of the Act. The statute also provides that penalties collected for child labor violations may be allocated to the enforcement agency for such use as the Secretary directs. The district court erred in concluding that, because the initial assessment of penalties is made by the regional enforcement officers, the civil penalty provision violates due process by creating an impermissible potential for bias in penalty assessments.

The due process standards established in cases such as *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), on which the district court relied, are applicable only to officials exercising judicial or quasi-judicial functions. The court erred in applying those standards to the initial assessment of penalties by an Employment Standards Administration assistant regional administrator, who performs the function of a plaintiff or prosecutor rather than a judge. The penalty in any contested case is imposed by an administrative law judge, not by the assistant regional administrator, and there is no risk of improper bias in the de novo proceeding before the administrative law judge.

Moreover, even if the due process standards of *Tumey* and *Ward* are applicable to the initial assessment of civil penalties by the assistant regional administrator, the statutory scheme does not create an impermissible risk of personal bias in that assessment. Unlike the situation in *Tumey*, the compensation of the assistant regional administrator is unaffected by the assessment of penalties. And, unlike the situation in *Ward*, the penalties represent a minute fraction of ESA's funding; indeed, the agency has each year returned substantially larger sums to the Treasury in unexpended appropriations than it has collected in penalties. The likelihood that an initial penalty assessment by the assistant regional administrator will be the product of bias could hardly be more remote and attenuated.

Finally, even if the provision in Section 16(e) that provides for the allocation of penalties to enforce-

ment agencies creates an impermissible risk of bias and thus violates due process, the district court erred in declaring invalid, and enjoining enforcement of, the entire civil penalty scheme. The valid portion of the statute imposing civil penalties should be preserved even if the portion permitting allocation of the penalties to the enforcement agency is defective. The language, legislative history and context of the child labor statute support the presumption that Congress would have enacted Section 16(e) without the allocation provision rather than have no civil penalty enforcement scheme at all.

ARGUMENT

SECTION 16(e) OF THE FAIR LABOR STANDARDS ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Section 16(e) of the Fair Labor Standards Act, 29 U.S.C. 216(e), authorizes the assessment of civil penalties against persons who employ child labor in violation of the Act. The statute also provides that penalties collected for child labor violations "shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties * * *." *Ibid.* The district court held that Section 16(e) violates the Due Process Clause because the initial assessment of penalties under the Act is made by the regional enforcement officers who investigate child labor violations. The court reasoned that, under the standards of *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409

U.S. 57 (1972), the reimbursement provision of the statute creates an impermissible potential for personal bias in penalty assessments.

The decision of the district court is erroneous for three separate reasons. First, we submit that the due process standards established in cases such as *Tumey* and *Ward* are applicable only to officials exercising judicial or quasi-judicial functions. Second, even if those standards apply to this situation, the court erred in concluding that the child labor civil penalty scheme creates a significant risk of personal bias. Finally, even if the reimbursement provision of Section 16(e) violates due process, the court should have enjoined only the enforcement of that provision and left the remainder of the statute in force.

A. Section 16(e) Is Not Invalid Under *Tumey* And *Ward* Because The Initial Assessment Of Penalties Is A Prosecutive, Not An Adjudicative, Function

The due process standards established in cases such as *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), are applicable only to officials exercising judicial or quasi-judicial functions. The district court erred in applying those standards to the initial assessment of penalties under Section 16(e) by an ESA assistant regional administrator, who performs the function of a plaintiff or prosecutor rather than a judge.

In *Tumey* and *Ward*, this Court reversed criminal convictions handed down by village mayors sitting as judges of the mayor's court. The Court held that the convictions entered in those contested proceed-

ings violated due process because, in *Tumey*, the mayor received a portion of the fines and costs he levied as personal income, and, in *Ward*, the mayor had primary fiscal and executive responsibility for the village, which was dependent on the fines he imposed for nearly half its revenue. Those circumstances, the Court held, created situations "which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused * * *." *Tumey* v. *Ohio*, *supra*, 273 U.S. at 532; *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 60.

The due process standard announced in *Tumey* and *Ward* is designed to avoid the possibility that personal bias may distort the truthfinding process in the adjudication of contested issues. These decisions are grounded in the common law principle that "[o]ne who stands to gain or lose personally by a decision either way is disqualified by reason of interest to participate in the exercise of *judicial* functions." 2 K. Davis, *Administrative Law Treatise* § 12.03, at 153 (1958) (emphasis supplied).[8] Thus, in *Tumey* the Court followed the "general rule" that "officers *acting in a judicial or quasi-judicial capacity* are disqualified by their interest in the controversy to be

[8] Professor Davis has observed that "[m]ost of the law concerning disqualification because of interest applies with equal force *to judges and to administrative adjudicators.*" K. Davis, *supra*, at 153 (emphasis supplied). See also *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973).

decided * * *," and it explained that the rule is necessary to prevent the temptation that personal interest might create for "the average man as a *judge* * * *." 273 U.S. at 522, 532 (emphasis added). Similarly, in *Ward*, the Court stated that "[t]he issue turns * * * on whether the Mayor can be regarded as an impartial *judge*." 409 U.S. at 59 (emphasis added).[9] The Court has since observed that these due process principles apply to "administrative agencies *which adjudicate* as well as to courts." *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975) (emphasis added). See also *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973) ("the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it"); *Bevan* v. *Krieger*, 289 U.S. 459, 465-466 (1933).

ESA assistant regional administrators do not act in a judicial or quasi-judicial capacity in making the initial assessment of child labor penalties under Section 16(e). These officers do not preside over hearings, nor do they make findings, based on evidence presented in an adversary context, on disputed questions of fact concerning either the existence of a violation or the proper penalty to be imposed. In issuing a notice of violation and penalty to an em-

[9] See also *Connally* v. *Georgia*, 429 U.S. 245 (1977), invalidating a scheme in which "the defendant is subjected to what surely is judicial action by an officer of a court who has 'a direct, personal, substantial, pecuniary interest'" in the matter. *Id.* at 250, quoting *Tumey* v. *Ohio*, *supra*, 273 U.S. at 523.

ployer (see 29 C.F.R. 579.5(a)), these officers exercise what is in effect a prosecutive function.[10] Their action is no different in substance from a government attorney's determination of what charges to bring in an indictment or what relief to seek in a civil complaint.[11]

When an assistant regional administrator assesses a penalty under Section 16(e), the employer has a right to file exceptions to the assessment. 29 U.S.C. 216(e). If the assessment is uncontested, that is, if

[10] See *Butz* v. *Economou*, 438 U.S. 478, 515 (1978) ("The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought").

[11] Appellee asserts (Motion to Affirm 17-18) that the function of the assistant regional administrator under Section 16(e) differs from that of a prosecutor because prosecutors are not required by statute to consider "the gravity of the violation" (29 U.S.C. 216(e)) in proposing criminal or civil charges. Appellee's assertion is incorrect both in general and in the particular context of the child labor laws. Prosecutors regularly must consider the gravity and nature of unlawful conduct in determining whether civil or criminal actions should be instituted and, if so, what charges to bring. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364-365 (1978); ABA Project on Standards for Criminal Justice, *Standards Relating To The Prosecution Function And The Defense Function* §§ 3.4., 3.9 (App. Draft 1971). In particu'ar, under Section 16(a) of the Fair Labor Standards Act, a prosecutor may seek a criminal fine only for willful violations of the Act and may seek imprisonment only for willful violators who have committed a prior offense under the Act. 29 U.S.C. 216(a).

an exception is not filed by the employer, the assessment becomes final by default without any adjudication.[12] *Ibid.* Adjudication of the violation occurs only

[12] The fact that the assistant regional administrator's initial penalty assessment becomes final under Section 16(e) if an exception is not filed does not make the notice of violation an "adjudication" or make the administrator a judge. The employer's failure to file an exception constitutes his consent to the charges, and the penalty may then be enforced in much the same manner as any consented forfeiture or settlement agreement. There is no need for an adjudication of charges that are undisputed, and it is not an adjudication for an administrative officer simply to allege that violations have occurred. Indeed, in *Ward*, this Court recognized that, even with respect to officials exercising clearly judicial functions, there is an important distinction between the determination of undisputed charges and adjudication of those same charges in a contested case. The Court there stressed that the question presented concerned "the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where he elects to contest the charges against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official * * * to accept a free and voluntary plea of guilty * * * or the like." 409 U.S. at 62 n.2.

The authority exercised by the assistant regional administrator under Section 16(e) is essentially identical in this regard to the authority exercised by the Secretary of Labor under Section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. 659(a). Under that statute, the Secretary may issue citations and penalties for violations and, "[i]f, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty * * * the citation and the assessment, as proposed, shall be deemed a final order * * * not subject to review by any court or agency." *Ibid.* If the notice of assessment under either 29 U.S.C. 216(e) or 29 U.S.C. 659(a) constitutes an "adjudication" simply because it becomes "final" if not con-

if the notice of penalty is contested. In that event, the existence of the violation and the amount of the penalty are determined de novo by an administrative law judge after a hearing conducted pursuant to the Administrative Procedure Act (5 U.S.C. 554). 29 U.S.C. 216(e). In the de novo proceeding before the administrative law judge, the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. 29 C.F.R. 580.21(a). The fact that the assistant regional administrator's role is essentially prosecutive and not adjudicative is emphasized by the Secretary's regulations, which state that the notice of penalty assessment and the exceptions filed to it "shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding." 29 C.F.R. 580.3(b).[13]

The district court recognized that there are no "due process infirmities in child labor proceedings before the administrative law judge [in contested cases]" (J.S. App. 10a) because the reimbursement provision of Section 16(e) has no application to the

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tested, then due process presumably would require that notice and an opportunity to be heard be given *before* the initial assessment is proposed. But the initial assessment is *itself* the notice of violation (29 C.F.R. 580.3(b)), and it has never been held that notice and an opportunity to be heard must be given *before* a civil complaint may be filed.

[13] The administrative law judge may not impose a penalty in excess of the amount contained in the notice of penalty. 29 C.F.R. 580.32(a). This may explain the substantial disparity (see Motion to Affirm 4) between the amounts initially assessed and those finally imposed.

Office of Administrative Law Judges.[14] The court concluded, nevertheless, that fairness at the adminis-

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[14] Despite this ruling of the district court (J.S. App. 10a), and although it is undisputed that the Office of Administrative Law Judges has never been allotted penalty funds under Section 16(e) (J.S. App. 10a; App. 25), appellee claims (Motion to Affirm 8, 17) that the administrative law judges are personally biased because the statute requires that their Office be reimbursed for its services from penalties assessed under Section 16(e).

This contention reflects a misunderstanding of the statute. Far from requiring the distribution of penalty funds to the Office of Administrative Law Judges, the statute does not even permit it. Section 16(e) restricts reimbursement from penalty proceeds to offices that "supervised [the] work" of "determining the violations and assessing and collecting [the] penalties." 29 U.S.C. 216(e). The agency which supervised that work is the Employment Standards Administration, which does *not* include the Office of Administrative Law Judges. That Office is a separate administrative section within the Department of Labor, with a separate budget. See, *e.g.*, *Budget of the United States Government, Fiscal Year 1979—Appendix*, pages 623-624. Indeed, the Administrative Procedure Act, which governs contested proceedings under Section 16(e), requires this separation, because it expressly forbids an agency from placing its administrative law judges under the supervision or direction of those who perform investigative or prosecutive functions for the agency. 5 U.S.C. 554(d). Conversely, the Act disqualifies anyone involved in the investigation or prosecution of a case from participating in its administrative adjudication (*ibid.*). See *Withrow* v. *Larkin*, 421 U.S. 35, 51-52 (1975).

Because the Office of Administrative Law Judges is not a part of the agency that supervises the work of assessing and collecting the penalties, Section 16(e) does not permit the Office to receive penalty funds as reimbursement. Even if an alternative construction of the statute were possible, the fact

trative law judge level does not cure what it viewed as impermissible bias at the initial assessment stage, and it relied on this Court's holding in *Ward* that the absence of a neutral and detached judge at the first level of adjudication cannot be remedied simply by the availability of a second, de novo, level of adjudication (J.S. App. 10a). See 409 U.S. at 61-62. But this principle of *Ward* has no application to the assessment of penalties under Section 16(e) because, as we have already noted, the initial assessment made by the assistant regional administrator is not a level of adjudication at all. See also pages 31-32, *infra*. Thus, to the extent that the district court's decision may have been based on its view that the initial penalty assessment is equivalent to an adjudication at the first, or "trial," level, the court simply misconceived the statutory scheme.

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that it might (as appellee contends) create a serious doubt of the statute's constitutionality is sufficient reason not to adopt it.

> [If] a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

International Association of Machinists v. *Street*, 367 U.S. 740, 749 (1961), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). The construction that has been adopted by the agency entrusted with administering this statute is not only "fairly possible," but it reflects the ordinary meaning of the words Congress has employed. There is no reason to depart from the administrative interpretation in this case. See *Andrus* v. *Sierra Club*, No. 78-625 (June 11, 1979), slip op. 10-13; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

To the extent that the district court's decision may have been based on the court's view that the due process standards established in *Ward* and *Tumey* are applicable to non-judicial, prosecutive functions, we submit that the court misapplied those decisions. In *Tumey*, the Court emphasized that the Due Process Clause does not require the same disinterest and neutrality from prosecutors that is required from judges, observing "that the legislature of a State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people." 273 U.S. at 535. Officials exercising prosecutive functions, whether in an administrative or judicial context, are not and should not be expected to be totally "neutral and detached judge[s]" of their own cases. *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 62. This Court often has recognized that prosecutors must have broad discretion in framing charges and requesting remedies (see, *e.g.*, *Butz* v. *Economou*, *supra*, 438 U.S. at 515; *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 365); in doing so, and in pursuing these cases to their conclusion, prosecutors may often be motivated by the kind of general ambition that the district court believed to be impermissibly fostered by the reimbursement provision of Section 16(e).

Although there unquestionably are constitutional limits to the discretion and partisanship of prosecutors, our adversary system presumes that government attorneys have at least some interest in the

success of their cases, and certainly have an interest greater than those responsible for adjudicating the cases. See *Withrow* v. *Larkin*, *supra*, 421 U.S. at 51-53. A holding that the standards of impartiality that this Court has applied to officials exercising judicial functions must apply equally to those exercising prosecutive functions would be incompatible with the very nature of the adversary system. Moreover, while a prosecutor may be barred—as a matter of common law policy or statute rather than due process—from initiating litigation in which he has a personal, pecuniary interest independent from the income that he receives for the performance of his office,[15] the fact that a government's attorney's salary may depend, in part, on fees obtained as a result of fines or money judgments is not a basis for disqualification due to bias. See *Tumey* v. *Ohio*, *supra*, 273 U.S. at 535; *Wyatt* v. *State*, 112 Tex. Cr. Rep. 280, 16 S.W. 2d 231 (1929); 27 C.J.S., *District & Prosecuting Attorneys* § 12(6)(b), at 664 (1959).

In sum, the Due Process Clause does not require enforcement officers to be wholly disinterested in the outcome of their investigations. Even though fundamental notions of fair procedure prohibit the exercise of "judicial power [by] one who by reason of his interest" cannot be impartial (*Tumey* v. *Ohio*, *supra*, 273 U.S. at 535), Congress could, if it chose, "stimulate prosecutions [of child labor law violations] by offering [rewards] to those who shall initiate and carry on such prosecutions * * *" (*ibid.*).

[15] See, *e.g.*, 28 U.S.C. 528; *State* v. *Harris*, 477 S.W. 2d 42 (Mo. 1972); *State* v. *Cox*, 246 La. 748, 167 So. 2d 352 (1964) (prosecutor may not bring criminal libel charge where he had a personal interest in the verdict as the injured party); *May* v. *Commonwealth*, 285 S.W. 2d 160 (Ky. 1955) (prosecutor should not bring criminal assault charge where he had a personal interest in the verdict as the injured party); *Delk* v. *Commonwealth*, 243 Ky. 38, 47 S.W. 2d 957 (1932) (prosecutor who is involved in the offense under investigation may not conduct the prosecution).

B. Section 16(e) Is Not Invalid Under *Tumey* And *Ward* Because The Potential Bias Allegedly Resulting From The Reimbursement Provision Of The Statute Is Insubstantial And Remote

Even if the initial assessment of penalties under Section 16(e) by the assistant regional administrators were subject to the due process standards of *Tumey* and *Ward*, the statute would not violate the Due Process Clause. Due process does not prohibit the exercise even of judicial power by officers whose personal interest in the adjudication is "so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual." *Tumey* v. *Ohio*, *supra*, 273 U.S. at 531, quoting T. Cooley, *Constitutional Limitations* 594 (7th ed. 1903). If the alleged personal interest "is too slight to excite prejudice against a [party]" (*Tumey* v. *Ohio*, *supra*, 273 U.S. at 529-530, quoting *Hesketh* v. *Braddock*, 3 Burrows 366 (S.C. 1847)), or lacks "sufficient substance" (*Gibson* v. *Berryhill*, *supra*, 411 U.S. at 579), the Due Process Clause does not require that the officer be disqualified even from making an adjudicative determination.

Dugan v. *Ohio*, 277 U.S. 61 (1928), which this Court distinguished in *Ward* (409 U.S. at 60-61), illustrates this point. In *Dugan*, the Court upheld a mayor's court conviction against a due process challenge. As in *Ward*, the fine imposed by the mayor in *Dugan* accrued directly to the city treasury. But, unlike in *Ward*, where the mayor had "wide executive powers" (409 U.S. at 58), the mayor in *Dugan* had "no executive, and exercised only judicial, functions." *Dugan* v. *Ohio*, *supra*, 277 U.S. at 63. The city manager, not the mayor, was "the active executive" (*ibid.*); the mayor was simply one member of a five-person commission that exercised all legislative and, together with the manager, all executive powers (*ibid.*). Moreover, although the mayor's salary was "paid out of a fund to which fines accumulated from his court * * * contribute, it is a general fund, and he receives [his] salary in any event, whether he convicts or acquits." *Id.* at 65. In these circumstances, the Court held that the mayor's relationship to the city's "executive or financial policy" was too "remote" to impute bias to him in his capacity as judge. *Ibid.* See also *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 61.[16]

[16] Similarly, in *Bevan* v. *Krieger*, *supra*, the Court upheld a state statute that authorized a notary public to imprison for contempt any witness who refused to testify at a deposition. The statute was challenged on the ground that the notary, who was paid for the testimony he transcribed, had a personal interest in compelling testimony, but the Court rejected the claim, holding that the notary's possible interest was "too remote and incidental to vitiate his official action" 289 U.S. at 466.

Although the district court correctly recognized that "the crucial consideration is the remoteness of the pecuniary interest" (J.S. App. 6a), it erred in striking down the civil penalty statute. The risk of bias created by the reimbursement provision of Section 16(e) is substantially less than that involved in *Tumey* and *Ward*, and, indeed, is considerably more remote than the danger of prejudice held to be constitutionally insignificant in *Dugan*.

In contrast to *Tumey*, no ESA official has a personal financial stake in his decision. See also *Connally* v. *Georgia*, 429 U.S. 245, 250 (1977); *Gibson* v. *Berryhill*, *supra*, 411 U.S. at 579. There is no evidence that sums collected as civil penalties increase the salaries of the administrators who assess them.[17] The situation here is thus entirely unlike *Tumey*, where the mayor was "paid for his service as judge [only if he] convict[ed] those who are brought before him." 273 U.S. at 520. See also *Connally* v. *Georgia*, *supra*, 429 U.S. at 250 (*Tumey* applies where a magistrate is paid "for his *issuance* of the warrant, and he receives nothing for his *denial* of the warrant"). Instead, the situation here is analogous to that in *Dugan*, where the Court held that the allega-

[17] Appellee claims that this case falls within the scope of *Tumey* because the penalties may be used to "reimburse [the] salaries" of the assessing officers (Motion to Affirm 23). This contention is incorrect. The salaries of the assistant regional administrators are fixed by law (see 5 U.S.C. 5332) and the penalties do not affect the level or availability of funding to pay these officers' wages. Moreover, as we note in the text, the penalties are not employed even indirectly to increase these officers' compensation.

tion of personal bias was insufficient because, even though the mayor's salary was paid out of a general fund to which the fines he levied contributed, "he receives [the same] salary in any event, whether he convicts or acquits." 277 U.S. at 65. The officers who make the initial penalty assessment under Section 16 (e) thus plainly lack any "substantial pecuniary interest" in the assessment that would disqualify them for personal bias or render any resulting judgment suspect under the Due Process Clause.

In addition, unlike in *Ward*, there is no realistic possibility that these officers' "executive responsibilities" (409 U.S. at 60) would influence their judgment in assessing penalties. Assistant regional administrators have no budgetary functions, and the penalties that are recovered do not accrue directly to their offices. Rather, the penalties are paid into a fund at ESA's national office in Washington, which determines whether and how to use them, subject to the approval of the Secretary of Labor (29 U.S.C. 9a; App. 24-27). The assistant regional administrator has considerably less executive and fiscal responsibility than the mayor in *Dugan*, who was one of the five members of the city's governing commission. Thus, even more clearly here than in *Dugan*, the assessing officers' "relationship to the finances and financial policy" of the agency that receives the funds is "too remote to warrant a presumption of bias." *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 60-61.

Moreover, in *Ward* and *Tumey*, the fines and costs assessed represented a "substantial" portion of the

village's total revenues, and there was direct evidence that responsible officials were concerned about the fiscal importance of that revenue source.[18] See *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. 58-59; *Tumey* v. *Ohio*, *supra*, 273 U.S. at 521, 533. Here, by contrast, the sums collected as civil penalties under Section 16(e) constitute a minute fraction—less than 1%—of ESA's national budget. See page 7, *supra*. Indeed, far from being fiscally dependent upon receipt of the penalties, ESA has each year lapsed unobligated funds to the Treasury in amounts greater than it has collected as civil penalties. *Ibid.* Even if (by hypothesis) ESA were to obtain substantial sums of money from penalty funds in some year, Congress might well simply appropriate a correspondingly lesser amount from general revenues for the operation of that agency in order to obtain the desired level of child labor enforcement. Congress ordinarily takes into account an agency's total resources and needs in making appropriation decisions. In context, then, these are "minor penalties * * * [that] do not involve any such addition to the reve-

[18] In *Ward*, the revenues from the mayor's court constituted approximately half of the town's income, and "[t]his revenue was of such importance to the village that when legislation threatened its loss, the village retained a management consultant for advice [about] the problem." 409 U.S. at 58. In *Tumey*, the mayor informed the village that he would continue to carry out the functions of the mayor's court "for village financial reasons" (273 U.S. at 521), and the facts showed that "substantial sums were expended out of the village treasury, from the fund made up of the fines thus collected, for village improvements and repairs" (*ibid.*).

nue of the [agency] as to justify the fear that the [assessing official] would be influenced in his * * * judgment by that fact." *Tumey* v. *Ohio*, *supra*, 273 U.S. at 534.

It is, in fact, exceedingly difficult to imagine how the statute would be likely to influence an assistant regional administrator's decision in the initial assessment of penalties. The official would have no basis for assuming that ESA would allocate *any* penalty funds to his regional office as the result of any assessment under Section 16(e), because ESA has allocated penalty payments to its regional offices only once since enactment of Section 16(e) and ordinarily has deposited the penalties in the Treasury. See pages 7-8, *supra*. Appellee is simply mistaken in contending (Motion to Affirm 7-8) that the statute *requires* the distribution of penalty funds to regional enforcement offices. 29 U.S.C. 9a, which is incorporated by reference in Section 16(e), provides that the penalty proceeds are to "be deposited to the credit of the appropriation of that bureau, service, office or division, or other agency of the Department of Labor which supervised [the determination of violations and the assessment and collection of penalties], and may be used in the discretion of the Secretary of Labor * * *."[19] This provision necessarily directs that re-

[19] The terms "bureau, service, office, division, or other agency" in 29 U.S.C. 9a refer not to each physical location at which a departmental unit establishes quarters but to the overall department unit itself. The departmental units to which the statute refers are necessarily those agencies that receive an appropriation directly from Congress, else it would

imbursement be made to the Employment Standards Administration itself and not to the several regional offices of that agency, because only ESA receives an "appropriation" to which the funds can be credited.[20] The regional offices do not receive an appropriation; instead, their expenses are provided for by the agency, with the approval of the Secretary, from the general ESA appropriation, and this allocation is made along whatever geographical and administrative lines the agency deems appropriate to accomplish its assigned responsibilities. Section 16(e) thus does not create any justifiable basis for regional administrators to believe that the penalties they assess will generate greater levels of funding for their particular regional office.

Furthermore, on the one occasion when ESA chose, in its discretion, to allocate civil penalty funds to its regional offices, it did so in proportion to the amount of money expended by each office in investigating and prosecuting child labor violations rather than in proportion to the level of penalties each office initially

be impossible to "credit * * * the appropriation" (*ibid.*) of the agency with the penalty proceeds. The statutory terms "bureau, service, office, division, or other agency" presumably derive from the fact that in 1934, when 29 U.S.C. 9a was enacted, administrative units with those designations (*e.g.*, Office of the Secretary of Labor, Children's Bureau, United States Employment Service) were the principal agencies within the Department of Labor and received appropriations directly from Congress. See *Budget of the United States Government, Fiscal Year 1935* at 393-406.

[20] See note 19, *supra*; *Budget of the United States Government, Fiscal Year 1979—Appendix*, pages 623-624.

assessed (J.S. App. 7a-8a; Defendants' Answers to Plaintiff's Interrogatories No. 2(d), 2(e), 2(g); App. 26-27). The decision of an assistant regional administrator to assess a heavy penalty in any case thus would not increase the allocation of funds to that region under Section 16(e).

It is perhaps theoretically possible that an assistant regional administrator might decide to expend more resources (*e.g.*, by hiring additional investigators) than his own budget would permit—a decision that might well be unlawful—in the hope that those expenditures would be funded by future allocations from his own penalty assessments. But this possibility is so attenuated and insubstantial, and rests upon a series of such increasingly improbable assumptions,[21] that it affords no basis for concluding that the statute that authorizes the initial assessment of penalties by enforcement officers violates the

[21] This possibility, which the district court apparently believed was significant, would require the assumptions that the assistant regional administrator's superiors would authorize him to increase the size of his staff and to increase child labor enforcement expenditures significantly in excess of his budget; that the regional office's pro rata portion of the aggregate penalty fund would be sufficient to cover those expenditures but would not be sufficient in the absence of that office's contributions to the funds; that the increased expenditures would uncover a correspondingly increased number of violations; that the administrative law judges would concur with the official's allegedly biased penalty assessments; and that ESA budget officers would decide in that year to allocate penalty funds to the regional office that made the allegedly biased assessments.

Due Process Clause. An interest that is "so remote [and] trifling" (*Tumey* v. *Ohio*, *supra*, 273 U.S. at 531) "is too slight to excite prejudice" (*id.* at 530) and does not disqualify these officers for personal bias even under the due process standards applicable to persons performing judicial or adjudicative functions.

Finally, even if it were thought that this case presented a "[n]ice question[] * * * as to what the degree or nature of the interest must be [for the assessing officers to be disqualified for personal bias]" (*Tumey* v. *Ohio*, *supra*, 273 U.S. at 522), there is an additional reason why Section 16(e) does not offend due process. Under this statute, any employer who contests the initial assessment made by the assistant regional administrator is entitled to a de novo hearing on all disputed issues before an administrative law judge. The administrative law judge, who clearly is not affected by the same alleged bias as the regional officer (J.S. App. 10a; see pages 18-20 and note 14, *supra*), may uphold or reject the charges and may impose a penalty in any lawful amount not in excess of the initial assessment (29 C.F.R. 580.32 (a)). Although the availability of de novo review by an impartial judge will not, by itself, preserve the constitutionality of a statute that directs a biased officer to preside over an initial hearing or trial (*Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 61-62), the availability of such review is plainly relevant in any case where the allegation of bias presents a difficult or "nice question" as to an officer's ability

to exercise his judgment without personal prejudice. See *Bevan* v. *Krieger*, 289 U.S. 459, 465-466 (1933).[22] The fact that the initial administrative assessment under Section 16(e) "is subject to [de novo] review" (289 U.S. at 466) before an impartial administrative law judge provides an additional assurance that the claimed bias will not distort the truth-finding function under the statute. The reimbursement provisions of Section 16(e) thus cannot be viewed as creating bias of "sufficient substance" (*Gibson* v. *Berryhill*, *supra*, 411 U.S. at 579) to offend notions of fair procedure, and hence a judgment requiring the payment of a civil penalty under the child labor statute does not violate due process.

C. Even If The Reimbursement Provision In Section 16(e) Is Unconstitutional, The Remainder Of The Civil Penalty Statute Is Valid And Should Be Left In Effect

Even if the portion of Section 16(e) that authorizes the application of civil penalties to reimburse agencies for enforcement efforts is unconstitutional, the district court erred in declaring the entire civil

[22] See also *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), where the Court refused to construe 5 U.S.C. 7501(a) to require that there be an impartial decisionmaker at a hearing *before* a federal employee is removed or suspended from service. Although there was no single opinion for the Court in *Arnett*, Mr. Justice Powell explained that neither the statute nor due process mandates that result because "an impartial decisionmaker is provided at the post-removal hearing where the employee's claims are finally resolved." 416 U.S. at 170 n.5. See also *Porter* v. *Califano*, 592 F.2d 770, 783 & n.22 (5th Cir. 1979).

penalty scheme unconstitutional and enjoining further enforcement of the statute. The court instead should have severed the reimbursement provision from the statute and given effect to the remainder of the civil penalty scheme. It is the settled rule that:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Champlin Refining Co. v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). Accord, *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). In this case, it is apparent that the reimbursement provision in Section 16(e) is severable from the remainder of the statute and that what remains is "fully operative as a law."

As the district court recognized, it would be "simple and constitutionally sound [for] all civil money penalty funds [to be paid] directly into the Treasury of the United States" (J.S. App. 12a). That is the result that would obtain if the reimbursement provision in Section 16(e) were declared invalid and the remainder of the statute were left in effect.[23] There is, moreover, nothing to suggest that Congress would have preferred to "eliminate its policy altogether"

[23] The reimbursement provision is wholly contained in the last sentence of Section 16(e). The remainder of this section, which relates to the imposition of the penalty, would remain fully operative if the allegedly defective reimbursement provision were excised.

(*Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring)) rather than simply excise the claimed constitutional defect. To the contrary, there is strong evidence that Congress would have enacted Section 16(e) without the reimbursement provision rather than forego entirely any civil penalty system for enforcing the child labor prohibitions in the Act.

First, Section 19 of the Act provides that "[i]f any provision of [the Act] or the application * * * to any person or circumstance is held invalid, the remainder of [the Act] and the application of such provision to other persons or circumstances shall not be affected thereby." 29 U.S.C. 219. Because Congress has expressed its intent to preserve any constitutional portion of the Act whenever possible, "when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced." *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938).

Second, the legislative history of Section 16(e) makes clear that the overriding concern of Congress in enacting the statute was to improve compliance with the child labor laws by imposing civil penalties for violations and that the reimbursement provision was merely incidental to this concern. The Senate Report on the 1974 Amendment that added Section 16(e) states that the purpose of the civil penalty provision is "to strengthen and promote vigorous enforcement of the child labor restrictions" (S. Rep

No. 93-690, 93d Cong., 2d Sess. 29 (1974)), and Senator Dominick remarked on the Senate floor that the civil penalty was adopted to "tighten[] up enforcement of the child labor provisions" (119 Cong. Rec. 14453 (1973)). This objective obviously would be frustrated if the civil penalty scheme were held unconstitutional in its entirety, because in that event enforcement of the child labor prohibitions would be left to the injunctive and criminal sanctions that Congress had previously determined to be inadequate. See page 4, *supra*. Severing the reimbursement provision from the remainder of Section 16(e), however, would have little if any adverse effect on attainment of the congressional goal.[24] Indeed, the legislative history contains no reference whatever to the reimbursement provision itself.

Finally, Congress has not included a similar reimbursement provision in analogous civil penalty statutes, such as the Occupational Safety and Health Act (29 U.S.C. 666(k)) or the Coal Mine Health and Safety Act (30 U.S.C. 819(a)). In these circumstances, we submit that it is exceedingly improbable that Congress would have declined to enact the civil penalty provisions of Section 16(e) in the absence of the reimbursement clause.

---

[24] As we have discussed at pages 26-30, *supra*, the reimbursement provision has no discernible, practical effect on enforcement efforts.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1979

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,

v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED

The issue before this Court is clear:

> "Whether Congress may constitutionally pass a law whereby civil money penalties assessed by a federal agency are kept by that agency, outside of its regular budget, and are to be used by specific statutory mandate to reimburse the agency for its ordinary expenses in determining the violations and assessing and collecting the penalties."

Despite the clarity of this issue and its basis in the actual language of section 16(e) of the Fair Labor Standards Act, the Solicitor General attempts to obscure the issue of section 16(e)'s due process infirmities by casting it in permissive terms rather than in the mandatory terms of the statute. In the interest of clarity and conformity with the actual language of section 16(e) Question 1 should read:

> 1. Whether section 16(e) of the Fair Labor Standards Act, which authorizes civil penalties for violation of the Act's child labor provisions, violates the due process clause of the fifth amendment to the United States Constitution because it *provides that sums collected as* penalties pursuant to section 16(e) *shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties.*

The italicized portion of this restatement of Question 1 represents Jerrico's modification of the Labor Department's statement of the issue. This language is taken directly from section 16(e) and better reflects the section's *mandate* as to use of the penalties rather than the *permissive* use of the penalties suggested by the Labor Department.

It is Jerrico's contention, upheld by the district court, that the plain and unequivocal language of section 16(e)'s reimbursement provision created the clear impression and expectation in the minds of Labor Department officials assessing child labor civil money penalties that they would be reimbursed for their ordinary costs of such assessments from the pool of child labor penalties collected by the Labor Department. The language of section 16(e) should be scrutinized by this Court both in terms of its effect on the judgment of involved Labor Department officials and its potential as a dangerous precedent in the federal system.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

For the convenience of the Court, the relevant portions of the United States Constitution and the involved statutes are reprinted in full.

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Section 16(e) of the Fair Labor Standards Act, 29 U.S.C. 216(e), provides in pertinent part:

> Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. * * * Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be

applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes." (29 U.S.C. 9a)[1]

29 U.S.C. 9(a) provides:

> All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States.

[1]The last sentence of section 16(e) is quoted as it appears in the enacted version of the Statutes At Large, Pub. L. 93-259, § 25(c), 88 Stat. 72. The discrepancy between the language found in the Statutes At Large and that which is found in 29 U.S.C. 216(e) is discussed in Appellee's Supplemental Statement at page 6-7.

SUPPLEMENTAL STATEMENT

Jerrico wishes to correct several material misstatements and omissions in appellants' statement of the case.

1. The government contends that review of assessments by Administrative Law Judges is *de novo* in that the Administrative Law Judge may impose a penalty in any amount up to that assessed by the delegate of the Secretary. Brief for Appellants, 5. In fact, review by Administrative Law Judges is limited to the occurrence of violations; Administrative Law Judges have no authority to reduce penalties assessed for violations which they find have occurred.

The language of the statute and its implementing regulations is explicit in this regard:

> "Any administrative determination by the Secretary of the amount of such penalty shall be final, *unless* within fifteen days after receipt of notice thereof by certified mail *the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred,* in which event final determination of the penalty shall be made in an administrative proceeding . . ."
> 29 U.S.C. 216(e) (Emphasis Added)

> *"An exception to the determination that the child labor violation or violations for which the penalty is imposed, occurred* may be filed within 15 days after receipt of the notice of penalty by the person so charged."
> 29 C.F.R. 579.6(a) (Emphasis Added)

Indeed, this position was argued forcefully by Labor Department Counsel at the administrative level, and represents the view of Administrative Law Judges as to their own role in the penalty process. See discussion below at 47-48.

Review so limited cannot be characterized as *de novo;* in fact, the amount of the penalty for any specific violation is set conclusively by officials of the Wage and Hour Division, not subject to diminution by Administrative Law Judges (ALJ) where the ALJ finds that the violations did occur.[2]

2. The government sets out the language of section 16(e) as it appears in the United States Code; Brief for Appellants, 5; for most purposes this version is adequate. The Court should be aware, however, that the enacted language of section 16(e), Pub. L. 93-259, § 25(c), 88 Stat. 72, ended with a reference not to "section 9(a) of this title", but rather to "section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9 a)."

The false air of legitimacy created by section 16(e)'s cross-reference, discussed *infra* at 24-27, is even greater when the reimbursement provision is muddied with references to "statistical studies" and other lawful purposes. Indeed, a quick reading of section 16(e) as enacted could

[2]In the instant case, the penalty was reduced from $103,000 to $18,500 only on the specific finding of the Administrative Law Judge that the facts surrounding the assessment did not demonstrated a willful violation. The assessment had separately calculated $18,500 as the penalty for the alleged violations; the additional $84,500 was expressly tied to the contention that, in addition to the violations penalized, appellee was also liable for an additional penalty for willful violations.

leave one with the impression that penalty sums were not to be used for the "ordinary expenses" of the agency (a phrase which appears in section 9(a) but not in section 16(e)), but rather for statistical studies such as those conducted pursuant to section 9(a). In requesting the statutory provision for civil money penalties, Department of Labor officials had the recent, clearly written and constitutionally sound model of the Occupational Safety and Health Act's penalty provision, 29 U.S.C. 666(k) (enacted approximately three years before the enactment of section 16(e)). Their choice of language drawn from the statistical studies statute originally enacted forty years earlier, with a completely different scope and purpose, is hard to explain unless the Labor Department had a specific interest in retaining the penalties for its own use and masking the novelty and questionable constitutionality of such a procedure by referencing *by title* the statistical studies statute.

3. Appellants' statement includes only an elliptical reading of the operative provisions of section 9(a). Brief for Appellants, 5. In full the section requires that sums collected "be deposited to the credit of the appropriation of that *bureau, service, office, division, or other agency* of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary, *and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States."* This broad reimbursement language creates the impermissible risk and appearance of bias which appellee challenges.

4. The Department's statement that, "[w]ithout disputing these facts, appellee moved for summary judgment", Brief for Appellants, 8, is misleading to the extent that it implies acquiescence in the government's statement of the facts. Jerrico here corrects several misleading points in the statement by the Justice Department. Since, the court below granted Jerrico's Motion for Summary Judgment and accordingly rejected the Department of Labor's contention that material facts were in issue, many factual assertions by the Labor Department were found by Judge Gasch to be inapposite to his conclusion that section 16(e) violates the due process clause of the fifth amendment to the U.S. Constitution.

5. The most egregious error in the statement by appellants is the contention that:

> "[t]he district court acknowledged that . . . if the assessment is challenged it is subject to a *de novo* determination by an administrative law judge . . . and that there is no risk of bias or due process violation at the administrative law judge level." Brief for Appellants, 9.

The contention takes Judge Gasch's words out of context and materially misstates the holding in his opinion.

Judge Gasch, ruling on Jerrico's Motion for Summary Judgment, was bound to consider as correct all facts alleged by the Labor Department. The language in his opinion relied upon by the Department is simply a statement of the allegations raised by the Department. The paragraph begins, "Defendants maintain that . .." J.S. App., 10a. Judge Gasch's ruling did not reach these allegations: for purposes of Jerrico's Summary Judgment Motion only, he

accepted the Labor Department's allegations as true. Even under such a view Judge Gasch found a violation of due process since even in assuming *arguendo* that no due process infirmities adhere to the Administrative Law Judge level, an alleged violator would not have received the fair hearing at the "trial" level, as explicitly guaranteed in *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972). Upon appeal, this Court is free to consider the full range of the infirmities inherent in section 16(e), as noted below, at 21-22.

6. Finally, appellants fail to note, in criticizing Judge Gasch for not severing the reimbursement provision in section 16(e), Brief for Appellants, 10, that the issue of severance was not raised by the Department of Labor until the filing of its Jurisdictional Statement with this Court. Rather, the Department of Labor objected to Jerrico's prayer for relief, but did not propose any alternative other than complete denial of the Motion for Summary Judgment.

SUMMARY OF ARGUMENT

The reimbursement provision of section 16(e) of the Fair Labor Standards Act requires that sums collected as child labor civil money penalties be applied toward the reimbursement of the costs of determining the violations and assessing and collecting such penalties. In essence, Department of Labor Assistant Regional Administrators assessing penalties for alleged child labor violations receive a proportion of such penalties as reimbursement for their costs. Such penalties were assessed within broad discretionary dollar bounds reviewable by Administrative Law Judges only as to whether the alleged violations occurred. These funds may be expended "notwithstanding any other provision of law" for all ordinary expenses including salaries of government and non-government personnel, travel expenses, supplies, equipment, and other such expenses all of which would otherwise have to be paid out of the particular office's official budget and in accordance with applicable spending regulations.

Larger penalty assessments yield a larger pool from which such costs may be proportionately reimbursed. Such penalty dollars, free from Congressional restraint and without restrictions as to use are more desirable than Congressionally appropriated funds and by nature tend to influence the assessor to maximize such penalties.

Were this scheme somehow found constitutionally permissible by the Court, its use would no longer be restricted to the as yet unique provisions of section 16(e). Instead, hundreds of penalty statutes, which now provide for constitutionally permissible use of penalties, and which

generate hundreds of millions of dollars annually, could be modified or amended to contain reimbursement provisions as in section 16(e) of the Fair Labor Standards Act, creating the same appearance and risk of bias. Section 16(e) is a dangerous precedent for the federal system and should not be sanctioned by this Court.

The Solicitor General argues that the biasing influence of section 16(e) is insubstantial because the Department of Labor, in the first three years of the imposition of section 16(e) penalties, and during the pendency of this litigation, has allowed unobligated funds in excess of child labor civil money penalties collected to lapse to the U.S. Treasury. This argument ignores the potential for growth in this relatively new civil money penalty reimbursement procedure, which growth can be fostered by increased enforcement efforts and maximized penalties rewarded by an increased proportion of the growing penalty pool for the assessing office.

On the basis of the facts presented below, a distribution of $39,200 was made to the Atlanta regional office in the year following the $103,000 assessment of child labor civil money penalties against Jerrico by that office. There is no indication in the record that the Assistant Regional Administrator of the Atlanta office did not use these funds in addition to funds already in his budget. Indeed, appellants concede that such use is appropriate under the statute. When an agency or office thereof has the ability, as with section 16(e), to impose discretionary penalties and increase its proportionate share of penalties unrestricted by ordinary spending limitations as reimbursement for costs, the interest of that office can hardly be described as insubstantial or remote.

The Solicitor General also argues that the appearance of bias, the potential for bias and any actual bias of the Assistant Regional Administrator is immaterial since a trial *de novo* is provided before the Office of Administrative Law Judges of the U.S. Department of Labor. The Court in *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972) held that *de novo* review was no cure for the lack of a neutral and detached judge in the first instance. The court below, applying the due process standard of *Ward* and *Tumey* v. *Ohio*, 273 U.S. 510 (1927) found, on the basis of the facts presented taken in the light most favorable to the Labor Department, that the Assistant Regional Administrator was potentially biased. J.S. App. 8a-9a. Moreover, Judge Gasch's application of the *Tumey* and *Ward* judicial due process standard to the Assistant Regional Administrator was supported by the facts. The Assistant Regional Administrator has broad discretion in assessing penalties of up to $1,000 per violation. His decision as to the amount of the penalty is not reviewable unless the alleged violator files an exception within fifteen days contesting the fact that the violations occurred. The Administrative Law Judge may then review the evidence relating to the occurrence of the violations but may reduce the assessed penalties only if he finds that the violations did not occur and only to the extent that the penalties were assessed for those violations. This limited scope of review is set forth in the statute, the regulations and the briefs of the Department of Labor in the administrative hearing below. Based on the discretion of the Assistant Regional Administrator in assessing penalties, the finality of his decision unless the statutorily limited exception is taken, and the narrow scope of review by an Administrative Law Judge, the facts clearly demonstrate the judicial or quasi-judicial nature of the Assistant

Regional Administrator's penalty assessing authority. Yet beyond the narrow finding on summary judgment below that Assistant Regional Administrators have an improper interest in the penalties they impose, it is equally proper for this Court to affirm the injunction which issued below on the basis of the potential for bias and the appearance of bias at the Administrative Law Judge level.

The Court should deny the government's request that the penalty reimbursement provision of section 16(e) be severed from the remainder of the section, allowing the civil money penalty system to remain in force. While severance may ordinarily be appropriate, it is ill advised in this situation. First, the appearance of bias and potential for bias derive from the very language of the reimbursement provision of section 16(e). Since actual notice to all Labor Department personnel of severance of section 16(e)'s reimbursement provision cannot be guaranteed, the potential for bias continues. Moreover, the appearance of bias remains in all codified versions of section 16(e) now in existence. Second, if the reimbursement clause of section 16(e) were severed, it is unclear where the civil money penalty funds would go. This would leave the remaining portion of section 16(e) incomplete, requiring the Court to direct disposition of the funds. Since this is a Congressional responsibility and since only speculation can be offered as to what Congress might have intended as an alternate disposition of the funds, the Court should deny the Solicitor General's severance request. Lastly, if the Court grants the Solicitor General's severance request, the injunction as to appellee (issued by the district court) should remain in effect. Severance of the unconstitutional provisions of section 16(e) would not correct the bias found by the court below to have existed in the penalty assessment of Jerrico.

ARGUMENT

I. REVERSAL OF THE DISTRICT COURT'S DECISION WOULD SET A DANGEROUS PRECEDENT FOR THE FEDERAL SYSTEM

Were this Court to somehow find the assessment and reimbursement scheme contemplated by section 16(e) to be within the due process of law standard, the due process of law guarantee of the fifth amendment would be seriously jeopardized with regard to government assessment of civil money penalties against private citizens.

The precedential effect of this Court's validation of the civil money penalty assessment and reimbursement process mandated by section 16(e) of the Fair Labor Standards Act for the multitude of civil penalty provisins throughout the government, makes it imperative that this Court declare the scheme unconstitutional by affirming the decision below. Already widespread and of significant dollar value, the use of civil money penalties as a sanction for violations of federal and state statutes and regulations is increasing at a rapid rate. *See,* Recommendation No. 72-6, Administrative Conference of the United States, 1 C.F.R. 305.72-6; Report in Support of Recommendation 72-6, Recommendations and Reports of the Administrative Conference of the United States, Vol. 2 (1971-72), 896.[3]

[3]"Federal administrative agencies enforce many statutory provisions and administrative regulations for violation of which fixed or variable civil money penalties may be imposed. During Fiscal 1971, seven executive and thirteen independent agencies collected well in excess of $10 million, in over 15,000 cases; all evidence points to a doubling or tripling dollar magnitude and substantially increasing caseload within the next few years. Increased use of civil money penalties is an important and salutary trend." 1 C.F.R. 305.72-6 (a), (b) (Footnote Deleted).

Exhibit 1 to Appendix A of the Report in Support of Recommendation 72-6, *supra,* references approximately two hundred fifty statutory provisions as merely an "illustrative catalogue" of enactments under which civil money penalties may be imposed. Many provisions, such as section 16(e), have been enacted since the time of the report. In 1977, $103 million was collected by the government as "fines, penalties, and forfeitures" (resulting from both civil and criminal actions); 1978 and 1979 estimates were $110 million and $145 million, respectively.[4] No statutory provision other than section 16(e), however, provides that penalties assessed pursuant to it shall be kept by the assessing agency for its ordinary expenses.

Were the potential bias, inherent in a scheme in which agencies are reimbursed for, and in direct relation to, their assessment and collection of civil money penalties, to become the norm rather than the unique exception, the Constitution's guarantee of due process of law would be seriously jeopardized for any alleged violation of statute or regulation subject to administrative enforcement.[5]

Section 16(e) remains unique among federal statutes with respect to its mandate that sums collected as penalties be used to reimburse the Labor Department for its costs of enforcement.[6] If this reimbursement scheme is validated by

[4]The Budget of the United States Government, Fiscal Year 1979, Table 10, p. 439.

[5]The recommendation of the Administrative Conference, that the use of civil money penalties be expanded, is limited with respect to agency action not subject to judicial review *de novo* (e.g. section 16(e) penalties) by "[t]he likelihood that an agency (or a group of agencies in combination) will establish *an impartial forum in which cases can be efficiently and fairly decided.*" 1 C.F.R. 305.72-6(B) (1) (g) (Emphasis Added).

[6]See Opinion of Judge Gasch, J.S. App. 11a.

the Court as within the due process requirements of the Constitution, all regulatory statutes providing for civil money penalties could constitutionally contain the identical reimbursement provision as in section 16(e). This would permit federal agencies presently assessing annually in excess of One Hundred Million Dollars ($100,000,000)[7] in penalties to spend such funds entirely outside the budgetary process and in addition to appropriated funds for uses including reimbursement of the ordinary expenses of the agency and the hiring of individuals not employees of the government, notwithstanding any other provision of law.[8] Such funds are most attractive to administrators because they may be expended "notwithstanding any other provision of law" and, as outside of the reported outlays from appropriations to the agency, are to a great extent hidden from Congressional oversight. Moreover, the only limitation on funds available to an agency having this new-found spending discretion would be the maximum penalty per violation contained in the statute and the ability of agency enforcement officials to find violations of the statute. The agency could gear its enforcement activities to the production of whatever level of penalty collections it desired.

A. Section 16(e) Violates The Due Process Clause Of The Fifth Amendment In That It Creates The Appearance Of Bias, The Potential For Bias And Actual Bias

The plain language of section 16(e) would lead the average man as assessing official to expect a significant

[7] *See*, footnote 4, *supra*.

[8] *See*, the language of section 16(e) and section 9(a).

return benefit resulting from, and dependent upon, his imposition of penalties under that section. Due process of law cannot be ensured in any proceeding under section 16(e) no matter how its reimbursement provision is construed or applied.

Section 16(e) mandates a regulatory scheme in which Department of Labor officials may reasonably expect to add significantly to the funds at their disposal from the return of civil money penalties to the credit of the appropriation of the bureau, service, office, division, or other agency of the Department of Labor as reimbursement for the cost of determining the violations and assessing and collecting the penalties. Such clear and unequivocal statutory language creates a *prima facie* appearance of bias and is a potential and significant influencing factor on the officials' judgment in each of their critical decisions.

Due process of law is a prophylactic concept; its aim is not only to provide a remedy for those who can meet the near-impossible burden of demonstrating actual impropriety or bias, but also to prevent even the possibility of undue influence and to preserve public confidence in the integrity of the government. Thus, disqualification is required whereever the potential for bias or the appearance of bias in judgment exists; wherever the situation is one "which would offer *a possible temptation* to the average man as a judge . . . which *might* lead him not to hold the balance nice, clear, and true . . ." *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1972) (Emphasis Added). *See also*, *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

The standard of concern for public confidence in the integrity of government officials is best expressed in Mr. Justice Frankfurter's admonition, "Justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954). Viewed against this standard, the constitutional infirmity in section 16(e) exists even without demonstration of any actual reimbursement of Department of Labor offices. Questions of the amount of penalties and whether, when, and how such sums were used, while important, are secondary to the initial due process determination. The proper scope of inquiry is rather, *whether any official might*, at the time he made any critical decision in the section 16(e) penalty process, *have had an expectation* that the funds available to meet the "ordinary expenses" of his office would be increased by any part of the penalty. The language of the statute is plain, mandatory, and unequivocal in this regard:

> "Sums collected as penalties pursuant to this section *shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties.*"
> 29 U.S.C. 216(e) (Emphasis Added)
> ". . . and may be used, in the discretion of the Secretary of Labor, and *notwithstanding any other provision of law, for the ordinary expenses of such* [*bureau, service, office, division or other agency*] and/or to secure the special services of persons who are neither officers nor employees of the United States."
> 29 U.S.C. 9(a) (Emphasis Added)

The plain language of the provision certainly "would offer a possible temptation to the average man" to maintain

a high level of section 16(e) penalty assessments. Due process of law cannot be ensured under such a scheme. The Court need not determine whether the expectation of the involved officials was justified or ultimately fulfilled; it is the risk that an expectation of improper benefit will enter into the decision-making process which violates the fifth amendment. Appellants, while attempting through a strained reading of the statutory provision to show that the language of section 16(e) should not have led the involved officials to expect reimbursement, *do not deny that it could have this effect.* Brief for Appellants, 28-32. Without reaching, at this juncture, the merits of the various allegations made by appellants in arguing that the risk of bias is slight,[9] it is enough to note simply the existence of that risk and the impossibility of determining its exact effect. For the fifth amendment provides a *guarantee* of due process, not a mere probability of due process. "[M]ight not a[n employer] with reason say that he feared he could not get a fair [hearing] or a fair [penalty] from one who would have so strong a motive to help his [office] by [assessment] and a heavy [penalty]?" *Tumey*, at 533 (*mutatis mutandis*).

The entire negotiating process of settling child labor violations and agreeing to proposed civil money penalties without pursuing the statutory right to an administrative hearing is tainted with this fear. For various reasons the settlement process is often the final step in an assessment; yet even review by Administrative Law Judges and the courts would not remedy the defect at the Assistant Regional Director Administrator level, for the Constitution

[9] *See*, Part II of this Brief which contains our argument as to the substantiality of the biasing influence of section 16(e).

guarantees a fair hearing at the initial level of an assessment, without forcing an alleged violator to take exception to or appeal such initial determination in order to vindicate his rights. *Ward*, 409 U.S. 61-62.

The undisputed circumstances in this matter show that the Department of Labor officials who assess section 16(e) penalties in fact had a justifiable basis for an expectation of increasing the funds at their disposal through assessing section 16(e) penalties: they could rely on the plain language of the statute, *supra*, of which they were aware both by fair implication and by admission, App. 48, 50, 53-55; on the discussion of the disposition of funds at various official conferences, App. 44, 47-48, 51, 52-53; and on the fact that sums collected as penalties actually were returned to their offices in 1977. Indeed, the reimbursement procedure was only halted when suit was filed in this case challenging its constitutionality. Currently, penalty funds are held in escrow, presumably for distribution upon requested reversal. Yet these factors go beyond the showing necessary to demonstrate a violation of due process. Judge Gasch, ruling on Jerrico's Motion for Summary Judgment, based his decision on the *actual* influence clearly shown in the undisputed facts presented to him.[10] Yet it is equally

[10]"The pro rata crediting of sums received as penalties by the Department of Labor to the various bureaus and regional offices charged with imposing those penalties tends to make those offices partisan to maintain a high level of penalty assessment. Clear evidence of this potential biasing effect is the assessment at the regional level of civil money penalties against plaintiff in excess of $100,000. The Assistant Regional Administrator imposed a fine which was nearly the maximum that could have been imposed under the statute. For fiscal 1977, the year following the initial imposition of penalties in this case, the regional office in Atlanta, which had jurisdiction over plaintiff, was allotted $39,200 as its pro rata share of total penalty funds received. The propensity of this relationship between assessment and allotment of penalties to create an atmosphere that permits less than objective balancing of alleged violations against proposed penalties does not comport with the notions of fairness inherent in due process of law." J.S. App. 8a-9a (Footnotes Deleted).

apparent, on full analysis, that the constitutional defect inheres in the very language of section 16(e): no possible construction or application of the section could overcome the potential for biased assessments and the appearance of improper interest which the clear, unequivocal statutory language creates. The argument that a statute which violated due process of law "on its face" could be upheld if "reasonable as applied" to particular parties was specifically rejected by this Court in *Aptheker* v. *United States*, 378 U.S. 500, 515-517 (1963);

> "To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute [under which an official might have come to the same administrative decision] but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects."
> *Aptheker*, at 515.

This Court is, of course, not confirmed to the grounds upon which Judge Gasch held section 16(e) unconstitutional, but may consider as well any alternate rationale leading to the same result. *See*, e.g., *California Bankers Association* v. *Shultz*, 416 U.S. 21, 71 (1974); *Dandridge* v. *Williams*, 397 U.S. 471, 475 (1970); *see also*,

Fusari v. *Steinberg*, 419 U.S. 379, 387, *rehearing denied*, 420 U.S. 955(1975). Section 16(e) because of its appearance of, and potential for, bias should be declared unconstitutional on its face.

B. The Interest Of Assessing Officials In Section 16(e) Penalty Funds Is Increased Because That Section's Procedure Circumvents The Normal Budgetary Process And Precludes Congressional Oversight And Control Of The Use Of Such Funds

A declaration of the unconstitutionality of section 16(e) is even more appropriate in view of that section's effect, unique among civil penalties, upon the funding of the offices which impose the penalties. By the particular language of section 16(e) and of section 9(a), sums collected as civil penalties could be and were kept by the Department of Labor, outside of the normal budgetary process. This peculiar and dangerous treatment of funds results from the transplanting of the purely business-related, market-oriented reimbursement process of section 9(a) in a statistical studies context into the realm of enforcement sanctions. This is evident from the specific terminology used in the provision: the penalty funds "shall be *applied toward reimbursement* of the costs" (29 U.S.C. 216(e)) of determining the violations and assessing and collecting the penalty and

> "shall be *deposited to the credit of the appropriation* of that bureau, service, office, division or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor

> and *notwithstanding any other provision of law, for the ordinary expenses* of such agency . . ." 29 U.S.C. 9(a) (Emphasis Added)

While the unusual cross-reference to an unrelated statistical study provision in a separate Act may draw attention away from the disposition of the penalty funds, reference to the budget documents makes clear the available disposition of the penalties collected by the Labor Department.

Amounts paid over to the federal government are classified in two general categories, "budget" or "governmental" receipts, and "offsetting collections." The Budget of the United States Government, Fiscal Year 1979, 282. Sums collected as "fines, penalties, and forfeitures" are ordinarily and properly classifed as "budget receipts" and deposited in the Treasury. *Id.*, 283, 439. Section 16(e) penalties, however, are treated as "*offsetting collections*, which are deducted from disbursements in calculating total outlays." *Id.*, 283. Offsetting collections should properly include only "collections from other government accounts or *from transactions with the public that are of a business-type or market-oriented nature.*" *Ibid.* (Emphasis Added). The anomalous position of section 16(e) penalties results from the statutory mandate that such sums be used as "reimbursement", "deposited to the credit of the appropriation" of the offices involved in the assessment process. Offsetting collections:

> " . . . are classified into two major categories: *collections credited to appropriation or fund accounts* and *offsetting receipts* (that is, amounts deposited in receipt accounts). In general, the

distinction between these two major categories is that *collections credited to appropriation or fund accounts can be used without appropriation action by the Congress,* whereas funds in receipt accounts cannot be used without being appropriated.

Collections credited to appropriation or fund accounts occur in two circumstances:

-*Reimbursements* - When authorized by law, amounts collected for materials or services furnished (for example, amounts received from the public to pay expenses of providing information under the Freedom of Information Act) are treated as reimbursements to appropriations. *These collections are netted in determining outlays from such appropriations . . .*" *Ibid.* (Emphasis Added in Part)

Thus, while by nature civil penalties are fines, section 16(e) penalties are not included in the nation's general revenues; and while not in any way "of a business-type or market-oriented nature", they are treated as "offsetting collections" as if regulatory law enforcement were a private enterprise.[11] While disposition on summary judgment

[11]The reimbursement provision of section 9(a) is perfectly appropriate for its original context, i.e. reimbursement for *services performed* by the Department for private parties. In that context, no constitutionally protected right is involved, parties consent to such costs by seeking the services of the Department, and the amounts so paid to the Department are limited to the actual costs of the specific work done. In contrast, amounts assessed as section 16(e) penalties may greatly exceed the marginal cost to the Department in assessing such penalties, and the penalty process works a deprivation of property such as must accord with the fifth amendment's guarantee of due process of law. Judge Gasch criticized the false air of legitimacy and the anomalous mix of governmental penalty assessments and business-like cost reimbursement created by section 16(e). J.S. App., 12a.

below did not require specific findings on the point, the Department has never suggested any alternate interpretation of the terms used in section 16(e) and 9(a); rather, the clear implication of appellants' statement of the case supports this view of the treatment of section 16(e) funds: " . . . it is theoretically possible for the challenged provisions of 29 U.S.C. 216(e) and 9a to increase the monies available to ESA in a fiscal year beyond those appropriated to it by Congress . . . " Brief for Appellants, 8.

The transplanting of the section 9(a) statistical study cost reimbursement concept to the section 16(e) penalty imposition context creates more than an accounting anomaly. Funds so collected remain in the Department and may be used to offset expenses *without appropriation action by Congress* and *without any corresponding decrease in properly appropriated funding.* The practical result is that the Department and various of its subdivisions may to a significant extent write their own budgets, apart from, and in addition to, sums appropriated by the Congress. Furthermore, there is no effective Congressional oversight of administrative activity under the section. Incoming funds remain within the Department, never appearing as governmental receipts; and the expenditure of such funds offsets the ordinary outlays of the agency, so that the amount reported as "outlays" does not reflect the true spending of the Department. Nor are the annual reports of the Department of any assistance in accurately

conveying the amount actually collected as section 16(e) penalties or the use of such funds. Thus, the Congress was kept in the dark as to the true level of operations of a major federal program.[12] Unlike charges under section 9(a),

[12]Appellants argue that "Congress might well simply appropriate a correspondingly lesser amount" for subsequent years, should it be displeased with the current level of enforcement operations. Brief for Appellants, 27. Such a procedure, of course, could not repair the failure of due process in current assessments: assessing officials would still tend to assess high penalties in the hope of receiving the funds in addition to whatever amount they may receive as appropriations. However, appellants also fail to explain how the Congress would be informed as to the amount and use of section 16(e) penalties, or even why the curiosity of any Congressman might be aroused to investigate the point. The funds are expended by the Department in offsetting "ordinary expenses", and thus do not appear as either appropriations or as outlays. The annual reports of the Department, while mentioning assessments, do not indicate the total amount collected as such penalties; nor is there any indication of how or by whom such funds were used — or even that the funds remained within the Department. United States Department of Labor Sixty-Fourth Annual Report Fiscal Year 1976, at 29, 68, 100; United States Department of Labor Sixty-Fifth Annual Report Fiscal Year 1977, at 63, 82, 114; United States Department of Labor Sixty-Sixth Annual Report Fiscal Year 1978, at 62, 92, 138. Even in the report for fiscal year 1977, when $650,000 in penalties was collected and $560,000 distributed as reimbursements (the Department has never accounted for the remaining $90,000), there is not even the slightest hint that the funds available for the "ordinary expenses" of any office were increased by such amounts. Only a single sentence in the section concerning the Employment Standards Administration notes assessments; a paragraph under the heading, "General Legal Services" in the section concerning the Office of the Solicitor (not, as one might expect, under the heading, "Fair Labor Standards") notes the collection of a mere $47,195 from pending 1976 cases but does not report amounts collected as a result of the assessment finally determined by the Department in 1977. United States Department of Labor Sixty-Fifth Annual Report Fiscal Year 1977, at 63, 82. Thus, the Congress never directly learns of amounts collected as section 16(e) penalties, of who controls such funds, of how such funds are distributed and used, or of the level of operations of the Department in this area.

penalties imposed under section 16(e) are not limited to the actual marginal cost of the section 16(e) procedure; rather, the amount available to the Department to meet its "ordinary expenses" may be increased by up to ($1,000) for each and every violation, or alleged violation, for which penalties are paid. Potentially, such sums are limited only by the number of violations alleged to occur.

In sum, Department of Labor officials involved in writing the regulations which define violations for which section 16(e) penalties may be imposed, setting enforcement policies for such regulations, determining the occurrence of violations, and setting the penalties for such violations, are further given the authority to collect and use funds resulting from these activities and to do so without Congressional oversight.[13] The dual dangers of the inherent failure of due process in assessments and the unexplained abdication of Congressional oversight and control mandate a firm declaration that the unique administrative enforcement scheme of section 16(e) is unconstitutional.

II. THE POTENTIAL FOR BIAS IN SECTION 16(e) PENALTY PROCEEDING IS SUBSTANTIAL

Judge Gasch's decision and opinion below did not reach the facial unconstitutionality of section 16(e), nor did he consider the substantial impact of the section on federal administrative processes outside of the scope of the particular statute at issue. His decision was based upon the undisputed evidence establishing an actual and improper

[13]Such a broad abdication of authority and responsibility by the Congress is of questionable constitutionality and no apparent benefit: at the very least, it should require an express statement of intent by the Congress. Yet the legislative history of section 16(e) is devoid of any mention of the critical reimbursement provision.

interest on the part of assessing officials in maintaining a high level of civil money penalty assessments and collections.

In analyzing the due process infirmities inherent in section 16(e) penalty provisions, the fact that Judge Gasch was fully aware "that the crucial consideration is the remoteness of the pecuniary interest alleged to be the biasing influence." (J.S. App., 6a) could not be more clear:

> "The Court is persuaded that this *direct and tangible relationship between reimbursement and assessment* is violative of due process. The pro rata crediting of sums received as penalties by the Department of Labor to the various bureaus and regional offices charged with imposing those penalties tends to make those offices partisan to maintain a high level of penalty assessment . . . *The propensity of this relationship between assessment and allotment of penalties to create an atmosphere that permits less than objective balancing of alleged violations against proposed penalties* does not comport with the notions of fairness inherent in due process of law . . . *The relationship between assessment of penalties and allotment of funds is direct, clear, and creates an impermissible potential for bias* in the initial decision-making process."
> J.S. App.8a-9a, 11a. (Emphasis Added)

Appellants do not contend, in arguing that the risk of bias under section 16(e) is insubstantial, that Judge Gasch misapprehended the standard to be judicially applied here;

rather, they propose that his conclusion was erroneous under that standard. Brief for Appellants, 25. Such a contention must meet the "clearly erroneous" standard. Fed. R. Civ. P. 52(a).

> "Insofar as that conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law. Insofar as the conclusion is based on 'inferences drawn from documents or undisputed facts, . . . Rule 52(a) of the Rules of Civil Procedure [requiring a showing that such conclusion be clearly erroneous] is applicable.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948)."
> *United States* v. *Singer*, 374 U.S. 174, 194 n. 9 (1963). *See also, Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976); *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86, 114 (1975).
>
> "The findings and conclusion of the District Court are, of course, governed by the 'clearly erroneous' standard of Fed. Rule Civ. Proc. 52(a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals."
> *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

Appellants contend that "section 16(e) is not invalid under *Tumey* and *Ward* because the potential bias allegedly resulting from the reimbursement provision of the statute is insubstantial and remote." Brief for Appellants, 23 (Initial Capitals Deleted).

Appellants' contention is based in part on the fact that sums collected as civil money penalties under section 16(e) constituted less than one percent of the Employment Standards Administration's national budget and that ESA has each year lapsed unobligated funds to the Treasury in amounts greater than sums collected as child labor civil money penalties. This contention ignores the potential for growth of the relatively new civil money penalty provisions of section 16(e) and the fact that any increase in an agency's appropriation through available civil money penalties will better enable that agency to stay within its budget. Furthermore, this contention ignores the fact that evidence presented in the court below indicates that the Atlanta regional office received a distribution from such penalties in the amount of $39,200 in the year following assessment of penalties against Jerrico. There is no indication in the record that these funds were not used by that office in addition to funds already in its budget.

Judicial opinions on "the remoteness of . . . the biasing influence" show a concern for two conceptually distinct issues: the *type* of interest alleged to violate due process, and the *magnitude* or substantiality of the interest. *See*, e.g., *Tumey*, at 522 ("Nice questions, however, often arise as to what the *degree* or *nature* of the interest must be.") (Emphasis Added)

Direct pecuniary remuneration is only one type of judically cognizable corruption of judgment; the advantage "alleged to be the biasing influence" may be one which accrues to an entity in which the official whose judgment is challenged serves in an executive capacity."A situation in which an official perforce occupies two practically and

seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law." *Tumey*, at 534; *see also, Ward, passim; Dugan* v. *Ohio*, 277 U.S. 61 (1928), *passim*.

Appellants place great weight on the contention that Department of Labor officials are not personally reimbursed through additions to their salaries for section 16(e) assessments. Brief for Appellants, 25-26. Such an allegation, however, misses the point.

As discussed above, section 16(e) provides in no uncertain terms that penalty funds be used by the bureaus, services, offices, divisions and agencies of the Department of Labor, "notwithstanding any other provision of law, for the ordinary expenses of such agency" as reimbursement for work involved in determining the violations and assessing and collecting penalties. The account including these ordinary expenses includes the salaries of the involved officials, and thus presents a *prima facie* appearance of bias independently sufficient to support a declaration of unconstitutionality. However, the danger of undue influence found by Judge Gasch lies in the concern of the assessing official for the financial interest of the regional office in which he is chief executive, and for the interest of the branch of the Department of Labor in which he is among the top executives:

> "The pro rata crediting of sums received as penalties by the Department of Labor to the various bureaus and regional offices charged with imposing those penalties tends to make those offices partisan to maintain a high level of penalty assessment. Clear evidence of this potential

biasing effect is the assessment at the regional level of civil money penalties against plaintiff in excess of $100,000. The Assistant Regional Administrator imposed a fine which was nearly the maximum that could have been imposed under the statute. For fiscal 1977, the year following the initial imposition of penalties in this case, the regional office in Atlanta, which had jurisdiction over plaintiff, was allotted $39,200 as its pro rata share of total penalty funds received. The propensity of this relationship between assessment [i.e. judicial concern] and allotment of penalties [i.e. executive concern] to create an atmosphere that permits less than objective balancing of alleged violations against proposed penalties does not comport with the notions of fairness inherent in due process of law . . . The relationship between assessment of penalties [i.e. judicial function] and allotment of funds [i.e. executive function] is direct, clear, and creates an impermissible potential for bias in the initial decisionmaking process."
J.S. App., 8a-9a, 11a. (Footnotes Deleted)

For the year noted by Judge Gasch, fiscal 1977, the national and regional offices of the Wage and Hour Division, and the Solicitor's Office, received over half a million dollars in section 16(e) penalty distributions. J.S. App., 9a, n.6.

Concerning the interest of assessing officials as executives, appellants further assert that "there is no realistic possibility that these officers' 'executive

responsibilities' (409 U.S. at 60) would influence their judgment in assessing penalties." Brief for Appellants, 26. In justification of this contention, appellants allege a lack of "budgetary functions" on the part of Assistant Regional Administrators, and further propose that the payment of section 16(e) penalties to a national office, for distribution to the various regions, obviates any due process infirmities in the scheme. Brief for Appellants, 26.

The simple answer to these contentions is that they do not address the full scope of the potential bias in section 16(e). Even if Assistant Regional Administrators were unconcerned with reimbursement of their regional offices, Department of Labor officials superior to them may still be biased in the roles they play in the assessment process. While appellants' contentions are limited to Assistant Regional Administrators, the provision for reimbursement may well affect the judgment of officials who set overall enforcement policy and to whom Assistant Regional Administrators must answer; officials who draft regulations, violation of which is punishable by section 16(e) penalties; officials who must approve of negotiated settlements of proposed civil money penalty assessments; and even Administrative Law Judges, who must by the terms of section 16(e) be reimbursed for their role in the penalty process. Of what benefit would it be to an alleged violator, even if it were true, that the official who first imposes a fine is not directly concerned with the amount assessed, when every other official with whom the alleged violator must have contact in pursuing his administrative remedy is apparently interested in seeing alleged violators adjudged liable for the greatest penalty possible? It is unnecessary for this Court to fathom the lowest reaches of

section 16(e)'s influence where it is certain that an impermissible interest may enter at some critical point in the administrative process.

Yet beyond this simple answer, appellants' contention is incorrect even as limited to Assistant Regional Administrators. Appellants misconstrue the standard laid down in *Tumey*, *Ward*, and *Dugan* for bias based on an executive responsibility. Budgetary functions *per se* are not a prerequisite. Rather, the test is whether the official's duties "may make him partisan to maintain the high level of contribution" from what should be a "neutral and detached" tribunal. *Ward*, at 60, 62. It is only where the official has "no executive but only judicial duties", *Dugan*, at 65, that his responsibilities will not interfere with his judgment.

Assistant Regional Administrators are executives in the Department of Labor, and chief executives in their own regions, with responsibilities which interfere with their judgment in section 16(e) penalty assessments. Moreover, despite appellants' unsupported contention to the contrary, the circumstances indicate that Assistant Regional Administrators do in fact have budgetary responsibility; else why would methods for distribution of penalty funds be an "Action Item" for discussion at a conference of such administrators? App. 44. Furthermore, Assistant Regional Administrators have executive duties as chief officers in their regions, such as would imply budgetary responsibility. Since appellee does not have access to the internal structure of the Department of Labor, a presumption of budgetary duties should run in its favor; appellants should be required to produce more than a bald

assertion to the contrary. However, apart from the question of fiscal responsibility, it is sufficient to note the general executive duties of Assistant Regional Administrators: as executives they are responsible for the affairs of their regions, and are thus outside of the scope of *Dugan's* allowance for purely judicial officers. Equally important, they are responsible as executives to the national office of the Wage and Hour Division and the Employment Standards Administration; such a position naturally carries with it a concern for the funding of the large entity, as well as a concern for one's possible advancement within the Department.

The executive responsibility of Assistant Regional Administrators is further apparent from the level of discretion granted them in setting enforcement policies for the section 16(e) penalty process: they are "authorized to represent the Secretary of Labor in assessing penalties", App. 47; and are charged with executive discretion in setting the amount of penalties in light of the factors set out at 29 U.S.C. 216(e) and 29 C.F.R. 579.5, App. 50-51. To argue that such an official, both within his region and as an officer of the Wage and Hour Division and the Employment Standards Administration, has "no executive but only judicial duties" exceeds credulity.

The payment of section 16(e) penalties to a national office, from which distribution to regions is required in proportion to their costs of child labor activity, does nothing to obviate the bias in assessment where, as discussed above, Assistant Regional Administrators expected to receive all or part of such funds in distributions at the time they assessed the penalties. As the agenda item

concerning distribution of penalty funds discussed at various official conferences most clearly suggests, the hope of receiving section 16(e) funds was not indefinite or remote. App. 44.

In addition to challenging the "executive responsibility" interest of Assistant Regional Administrators, appellants contend that any such interest is too slight to affect the officials' judgment, and thus acceptable by due process standards. Again, Judge Gasch's findings and conclusions, *supra*, applying the "substantiality" standard of *Tumey*, are clear. It is undisputed that the Atlanta regional office received $39,200 in section 16(e) penalty funds, and that over half a million dollars in such funds was distributed throughout the Employment Standards Administration, in 1977. It is difficult to see how such sums could be characterized as *de minimis*, especially when coupled with the fact that such sums are in addition to appropriated amounts and not subject to Congressional control, as discussed above.

Yet a more telling figure is the amount assessed as section 16(e) penalties, not the amount collected or the amount distributed; such a figure more clearly reflects the expectation of regional officials that they would receive such funds, and highlights the distorted judgment such an expectation will produce. In 1976, when $151,000 in section 16(e) penalties was collected, J.S., 7, assessments "totalled almost $463,000", United States Department of Labor Sixty-Fourth Annual Report Fiscal Year 1976, at 29. Similarly, while collections in 1977 and 1978 reached $650,000 and $592,000 respectively, J.S., 7, assessments were "nearly $1.3 million" and "nearly $1.9 million"

respectively, United States Department of Labor SixtyFifth Annual Report Fiscal Year 1977, at 63; United States Department of Labor Sixty-Sixth Annual Report Fiscal Year 1978, at 62.[14]

While the amounts *actually returned* to regional offices are sufficient to meet *Tumey's* standard of a "possible temptation to the average man as a judge", it is clear that the *expectations* of the assessing officials may have run even higher. Should this Court uphold section 16(e), sums collected and held within the Department could readily amount to hundreds of millions of dollars annually, given the hundreds of thousands of minors under age 18 employed and the Department of Labor's authority and responsibility to determine by regulation what acts or omissions on the part of an employer shall constitute punishable child labor violations.[15] As discussed above, the ability to finance opeations and to retain such sums is all the more tempting because it is outside of Congressional oversight and control or other restrictions imposed by law. Amounts already large enough to merit discussion at official conferences, totalling in the thousands of dollars for individual regions, and received without the safeguards of the appropriations process, cannot be considered *de minimis* in the mind of a regional executive.

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[14]As noted above, despite the reporting of section 16(e) *assessments*, and elsewhere in the Labor Department's Annual Report, the reporting of the dollar value of *assessments considered by administrative law judges*, the Annual Reports *do not* give the total amounts *collected* as section 16(e) penalties, nor do they indicate that such sums were retained by the Department of Labor.

[15]The Department's responsibility and authority derive from section 3(L) of the Fair Labor Standards Act (29 U.S.C. § 203(L)) and regulations promulgated thereunder at 29 C.F.R. Part 570.

While sums collected as section 16(e) penalties thus exceed the *de minimis* exception noted in *Tumey* ("*so remote, trifling,* and *insignificant . . . incapable* of affecting the judgment . . . " *Tumey*, at 531), nevertheless this Court should not feel bound by even the minimal "substantiality" requirements of *Tumey*. For the Constitution's guarantee of "due process of law" contemplates the meaning of that phrase at English common law at the time of the adoption of the Constitution. *Tumey*, at 523, and cases therein cited.

> "These cases show that, in determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . . Indeed, in analogous cases [at common law] it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable.[Citations Omitted]"
>
> *Tumey*, at 523, 524.[16]

[16]An explanation of appellants' "quote" from Burrows' nonexistent South Carolina reports is in order. Appellants contend that due process is not violated " '[i]f the alleged personal interest' 'is too slight to excite prejudice against a [party]' (*Tumey v. Ohio, supra,* 273 U.S. at 529-530, quoting *Hesketh v. Braddock,* 3 Burrows 336 (S.C. 1847) . . . " Brief for Appellants, 23. The source of the quote is actually *City Council* v. *Pepper,* 1 Richardson (S.C.) 364, 366 (1845); and that case distinguished the common law principle, noted in *Hesketh* and

This Court has been willing to countenance the development of the "insubstantial" exception when reviewing the procedures of states. *Tumey*, 529-531. Yet neither *Tumey* nor its progeny have held such an exception applicable to the federal system. Far from an anachronistic technicality, a strict due process standard, disqualifying official for even the slightest interest in the outcome of a penalty assessment, would be in line with current federal concerns. The federal policy reflecting great concern in avoiding even the slightest impropriety is best summed up in the axiom of Mr. Justice Frankfurter, quoted above at page 18.

In applying the standard laid down in *Tumey* to arbitration under a federal statute, this Court has noted that "in *Tumey* the Court held that a decision should be set aside

applicable to the instant case, on the ground that "all the people of the State, through their legislature [might] dispense with the common law objection", *Pepper*, at 366; *Tumey*, at 529. *Pepper* was, of course, decided prior to the enactment of the fourteenth amendment; further, the federal legislature has no authority to amend or overrule the Constitution by statutory enactment. Thus, the allowance of a slightly less rigid due process standard in state proceedings has no application to the concept of the due process of law contemplated by the fifth amendment; the strict common law standard remains in force. What *Hesketh* actually said on the subject was:

> "There is no Principle in the Law more settled than this — That *any* Degree, even the *smallest* Degree of Interest in the Question depending is a decisive Objection to a Witness, and much more to a *Juror*, or to the *Officer* by whom the Jury is *returned* . . . *The Minuteness* of the Interest won't relax the Objection, For the *Degree* of Influence can't be measured: No line can be drawn, but that of a total exclusion of *all* Degrees whatsoever." *Hesketh* v. *Braddock*, 3 Burrows 1847, 1855 (1766) (Emphasis in Original)

A fortiori the same standard applies to judges and quasi-judicial officials.

where there is the 'slightest pecuniary interest' on the part of the judge, and specifically rejected the State's contention that the compensation involved there [$12] was 'so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . .' " *Commonwealth Coatings Corporation* v. *Continental Casualty Company*, 393 U.S. 145, 148, *rehearing denied*, 393 U.S. 1112 (1968).

Whether viewed under the *Tumey* standard for substantiality of interest, or under a more strict scrutiny in the spirit of both the framers of the Constitution and the modern federal policy reflecting concern for the appearance of propriety in government, Judge Gasch's finding that the potential for bias in section 16(e) proceedings is substantially supported by the law and the facts.

III. THE DOCTRINE OF DISQUALIFICATION FOR INTEREST WAS CORRECTLY APPLIED BY THE COURT BELOW TO THE ADMINISTRATIVE PROCESS AT ISSUE

Section 16(e) mandates that sums collected as civil money penalties for child labor violations shall be used to reimburse the bureau, service, office, division, or other agency of the Department of Labor which supervised the work for the cost of determining the violations and assessing and collecting such penalties. The language of section 16(e) creates an impermissible risk of bias on the part of the Assistant Regional Administrators who determine the amount of the penalties within broad discretionary parameters; on the part of the Administrative Law Judges who make the final determination of the occurrence of the violations in contested cases; and on the part of other officials involved in the overall supervision of the Department's child labor penalty activities. Jerrico

maintains that the district court properly applied the standards of due process in finding that the biasing influence created by section 16(e) is a violation of the fifth amendment. It should be noted that the appellant carries the burden of convincing this Court that the hearing before the district court was either inadequate or that the legal conclusions deduced from the facts were erroneous. *See, Gardner* v. *California*, 393 U.S. 367, 370 (1969).

A. The Discretionary Authority Of The Assistant Regional Administrator, When Coupled With The Pecuniary Interest Created By Section 16(e), Violates The Standards Of Due Process

The Solicitor General argues that the Assistant Regional Administrator performs a prosecutive function totally devoid of judicial or quasi-judicial responsibilities; and, therefore, the due process standards established by this Court in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), are not applicable. Brief for Appellants, 13. This argument is incorrect on both legal and factual bases. Assistant Regional Administrators have a wide range of discretion in determining the amount of penalties to be assessed up to the $1,000 maximum per violation provided by statute. Among other things, the Assistant Regional Administrator is to take into consideration the appropriateness of such a penalty to the gravity of the violation; any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; and the size of the business. 29 C.F.R. 579.5(c). This discretionary penalty-setting authority of the Assistant Regional Administrator, which is largely unreviewable by an Administrative Law

Judge, (see *infra* at 46-49) injects at the very least *quasi-judicial* authority into this role. The acts of an officer which are administrative in their character and which call for the exercise of that officer's judgment and descretion are not ministerial acts and his authority to perform such acts is quasi-judicial. *See, American Casualty Ins. Co. v. Fyler,* 60 Conn. 448, 22 A. 494 (1891). The role of the Assistant Regional Administrator is to be contrasted with that of a prosecutor. A prosecutor does not set the penalty for a contested or uncontested charge, but rather recommends a penalty which is approved, modified or disapproved after review in the courts. If the Assistant Regional Administrator's responsibility was limited to an investigation as to whether the violations had occurred, with a determination as to the amount of the penalty to be made by an impartial judge, the Administrator's role could be likened to that of a prosecutor. However, this was not the fact in the instant case. Section 16(e) provides that the determination of the Administrator is final unless the person charged with the violation takes exception within fifteen days after receipt of notice thereof. This authority to set a conclusive penalty rather than to propose a penalty to be sought is a further indication that his authority is judicial in nature rather than prosecutive.

The significance of the Assistant Regional Administrator's judgment becomes evident when it is noted that his decision becomes final absent an exception within fifteen days after notice thereof. His discretion, at a minimum, places a great burden on the alleged violator to come forward and re-litigate the issues before an Administrative Law Judge. With the potential for significant cost reimbursement from assessed penalties and the limited

scope of review by an Administrative Law Judge, the Assistant Regional Administrator can expect few alleged violators to appeal his ruling; and, those appealed to be infrequently overturned in their entirety. Given this authority, it is not necessary, nor even helpful, to attempt to make a semantic distinction between the titles of prosecutor or adjudicator; the authority remains the same.

The Solicitor General cites *Withrow* v. *Larkin,* 421 U.S. 35 (1975) to support the proposition that government attorneys may have at least some degree of interest in the success of their cases. In *Withrow,* this Court held that there was no risk of bias in a situation where the same administrative agency had both investigated and adjudicated the same issues. *Withrow* holds that the simple combination of investigative and adjudicative functions in the same agency is not, without more, a violation of the due process standards. *Withrow* is distinguishable from this case because the "something more" needed to create an impermissible risk of bias, that did not exist in *Withrow,* does exist here. In this case the Assistant Regional Administrator, not the agency of which he is a part, had both investigatory and adjudicatory functions and he had an expectation of and was in fact reimbursed for those investigatory and adjudicatory functions.

Any Assistant Regional Administrator reading section 16(e) would have an expectation of reimbursement for his office. It is not necessary, as the Solicitor General contends, for the Assistant Regional Administrator to take part in the budgetary process (even though he certainly has input in budget developments and expenditures), because the reimbursement of his office through allocated child labor

civil penalty funds is totally outside of the budget authorized by Congress and the distribution of such funds is made in addition to the normal budget allocations. Moreover, these funds may be expended for the office's ordinary expenses "notwithstanding any other provision of law." 29 U.S.C. 9(a). Expectation of reimbursement is evidenced by the participation of the Assistant Regional Administrator of the Atlanta region, who assessed child labor penalties against Jerrico, in a conference of the Department of Labor Employment Standards Administration's officials which was subsequently recorded as follows:

> " 'ACTION ITEMS DEVELOPED AT WAGE AND HOUR AREA CONFERENCE, WILLIAMSBURG, VA (DECEMBER 15 - 17, 1976)'
>
> '4. *Prepare formula for allocation* of major portion of CL-CMP's (Child Labor-Civil Money Penalties) collected to the regions for furtherance of CL compliance efforts.' "
>
> App. 44, Defendants' Answer to Plaintiff's Interrogatory No. 7 at Exhibit D (Emphasis Added)

This "Action Item" also evidences the budgetary role of the Assistant Regional Administrator, which was not adequately addressed in the government's pleadings, discussed *supra* at 33-35.

Further evidence of the expectation of reimbursement is found in the facts herein. The Assistant Regional

Administrator in Atlanta assessed civil money penalties against appellee in excess of $100,000, which was nearly the maximum that could be imposed under the statute. J.S. App. at 8a-9a. In fiscal year 1977, the year following the initial imposition of penalties in this case, the regional office in Atlanta was allotted $39,200 as its pro rata share of total penalties received. *Ibid.*

The above facts indicate that section 16(e), as read and as applied, gives the Assistant Regional Administrator a natural expectation of reimbursement for his office based on the expense his office has incurred in determining child labor violations and assessing and collecting such penalties. When this expectation of reimbursement is coupled with the wide range of discretion exercised by the Assistant Regional Administrator, the appearance of and potential for bias are unquestionably present. It is the combination of discretion in assessing penalty amounts, unreviewable except on the narrow issue of whether the violation occurred, (discussed *infra* at 46-49.) coupled with the substantial financial incentive of the Assistant Regional Administrator to maximize penalties, which results in a significant violation of due process. As Judge Gasch correctly found in his decision below:

> "Since civil money penalties are assessed in the first instance by regional officials whose office is subsequently allotted a portion of penalties received, plaintiff in this case did not receive in the first instance access to a 'neutral and detached judge.' "
> J.S. App., 11a.

B. Description Of The Review By The Administrative Law Judge As *De Novo* Is Inaccurate

The Solicitor General contends in his argument that the decision of the Assistant Regional Administrator is not final because the person charged with the violation has the option to contest the notice of penalty and receive a *de novo* review by an Administrative Law Judge. Brief for Appellants, 18. The classification of this hearing by an Administrative Law Judge as a *"de novo"* review is inaccurate. The Solicitor General states that in the event that a person charged with the violation takes exception to the assessment, " . . . the existence of the violation and the amount of the penalty are determined *de novo* by an administrative law judge . . . " Brief for Appellants, 18. This statement would lead one to believe that determinations by the Assistant Regional Administrator of (1) the occurrence of the violation and (2) the reasonableness of the penalty, can be determined by the Administrative Law Judge separately and independently on the basis of all the evidence.

However, this is not the case. A person charged with a violation of the child labor laws may take exception *only* to the determination that the violation actually occurred. If the occurrence of the violation is not contested, the Office of Administrative Law Judges is not empowered to determine the reasonableness of the penalty or hear any mitigating evidence from an alleged violator. Therefore, a totally unreasonable penalty assessed contrary to the evidence and the standards contained in section 16(e) is final and unalterable unless the alleged violator contests "the occurrence of the violation" or reaches some settlement

with the involved Labor Department officials out of fear that a fair or complete hearing is not possible before a neutral and detached judge. The regulations set forth the procedure for taking an exception to a notice of penalty. The relevant regulation reads as follows:

> "An exception to the determination that the child labor violation or violations, for which the penalty is imposed, occurred may be filed within 15 days after receipt of the notice of penalty by the person so charged."
> 29 C.F.R. 579.6(a)

Furthermore, the language used in the *Notice of Penalty* correspondence that is sent to persons charged with violations of the child labor laws tracks the language of 29 C.F.R. 579.6(a) almost word for word. A reading of the *Notice of Penalty* letter indicates to an alleged violator that one may dispute only the factual occurrence of the violation, with no recourse for a dispute as to the reasonableness of the penalty.

Moreover, this contention argued by the Solicitor General's office that *de novo* review exists at the Administrative Law Judge level is in direct conflict with what the Department of Labor argued on this issue in their brief at the administrative level of this case. The Department of Labor addressed this issue in the following manner:

> "The exception permitted by section 16(e) is *expressly limited to whether the violations for which the penalty is imposed actually occurred.* This defines the scope of the matter to be heard by the ALJ (Administrative Law Judge) and he cannot consider matters outside that scope."

Brief For The Secretary of Labor - Post Hearing, And In Support of Proposed Decision And Orders at 32 (Emphasis Added)

The thrust of the Department of Labor's argument gives credence to the proposition that when a person charged with a violation takes exception to the notice of penalty as per 29 C.F.R. 579.6(a), he is receiving at best an incomplete appellate review from the assigned Administrative Law Judge. The Solicitor General's characterization of the procedure as a *de novo* hearing and the Department of Labor's view of the procedure as narrow appellate review expressly limited to the question of the factual occurrence of the violation, could not be in more direct conflict.[17]

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[17]*In re Ray Marshall* v. *Sambo's Restaurants, Inc.*, Opinion of *William A. Pope II*, Administrative Law Judge, Case No. 79-CL-547, dated September 7, 1979, Washington, D.C. In his Order Granting Summary Judgment to the Department of Labor ALJ Pope indicates the opinion of Administrative Law Judges as to their scope of review in cases involving child labor violations. Judge Pope states:

> ". . .the regulations implementing the Act quite clearly state that the Secretary's determination of the amount of the penalty is final, unless respondent first contests the occurrence of alleged violations by filing an exception within the required time. . . . Neither this section of the regulations [579.4 (c)] nor any other section authorizes the filing of an exception to the appropriateness of the penalty as a means of obtaining a hearing and final determination of the penalty by an administrative law judge."

Judge Pope granted the Department of Labor's Motion for Summary Judgment because, in his opinion, the letter of exception filed by respondents did not constitute an exception to the "existence of the violations;" rather it argued, for various mitigating reasons that the penalty was not appropriate. For this reason the letter did not constitute an exception within the meaning of the regulations and, "therefore, the Secretary's determination of the amount of the penalty must be deemed final. Section 579.4(b)"

The Solicitor General states that the authority exercised by the Assistant Regional Administrator under section 16(e) is "essentially identical" to that of the Secretary of Labor under section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. 659(a). Brief for Appellants at 17, n. 12. A reading of the language of section 10(a) indicates that the authority granted to the Assistant Regional Administrator and its finality under section 16(e) is far greater than that which is granted to the Secretary under section 10(a) of the Occupational Safety and Health Act.[18] The fact that a person charged with a violation is not permitted to take exception to the amount of the penalty assessed, but only to the occurrence of the violation, has two significant results. First, it re-emphasizes the significance and the finality of the discretionary authority exercised by the Assistant Regional Administrator in determining the amount of penalties to be assessed. Second, it discredits the Solicitor General's contention that the Administrative Law Judge affords *de novo* review to an alleged violator, since *de novo* review can hardly be said to exist where the Administrative Law Judge must accept the Assistant Regional Administrator's determination as to the amount of penalty, and can only reduce the total amount of penalties assessed by finding that a particular violation or violations did not, in fact, occur. This further discredits the Solicitor General's Claim that the Assistant Regional Administrator's role is analogous to that of a prosecutor (discussed *supra* at 41-45).

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[18]The relevant portion of section 10(a) reads as follows: "(i)f, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to *contest the citation or proposed assessment of penalty*. . ." Section 10(a), 29 U.S.C. 659(a) (Emphasis Added) In contrast, section 16(e) permits an exception only to the fact that the violations occurred.

C. Appearance Of Bias And Potential For Bias Exists At The Administrative Law Judge Level

The second major contention of the Solicitor General regarding the applicability of the due process standards deals with the way in which they apply to the Administrative Law Judge. The Solicitor General states that, "The district court recognized that there are no 'due process infirmities in child labor proceedings before the administrative law judge [in contested cases]'." Brief for Appellants, 18. Not only is this a misinterpretation of the district court's decision, it is a distortion of the actual language used by Judge Gasch in his opinion. Judge Gasch did not reach a conclusion on this issue at all. Instead, he found that because of the inherent unfairness that existed at the level of assessment, a later review could not correct the original bias. J.S. App., 10a.

Judge Gasch did not even venture into a analysis of the issue of bias at the Administrative Law Judge level, except to restate the Department of Labor's contentions. He then went on to say that a party "is entitled to a neutral and detached judge in the first instance" (citing *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972)), J.S. App., 10a, and "plaintiff in this case did not receive in the first instance access to a 'neutral and detached judge.' " J.S. App., 11a.

This Court has firmly established the proposition that unfairness at the trial level cannot be corrected through the existence of an appeals process. *Ward, supra*, 61. However, in the event that this Court finds that no bias existed at the level of assessment by the Assistant Regional Administrator, there is evidence to support the contention that the potential for and the appearance of bias exists at the Administrative Law Judge level.

The language of section 16(e) provides for reimbursement in the following manner:

> "Sums collected as penalties pursuant to this section *shall be applied* toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with [29 U.S.C. 9(a)]".
> (Emphasis Added)

The language of 29 U.S.C. 9(a) referred to in section 16(e) states:

> "All moneys hereinafter received by the Department of Labor in payment of the cost of such work *shall be deposited* to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and *may be used in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency* and/or to secure the special services of persons who are neither officers nor employees of the United States."
> (Emphasis Added)

The Office of Administrative Law Judges is unquestionably an "office" of the Department of Labor, as used in the context of the language of section 9(a). Furthermore, the Office of Administrative Law Judges, certainly takes part in the "determination" of the violation,

as used in the context of section 9(a), in that the Administrative Law Judge determines if the violation did in fact occur. The fact that the penalties in the instant case were not actually used to reimburse the Office of Administrative Law Judges is immaterial. Unless this Court affirms the unconstitutionality of section 16(e), penalties collected in the future can and must be used to reimburse such costs. Surely the standards of due process as set forth in *Tumey* and *Ward* are to be applied to administrative adjudication. This Court expressed support for this principle in its decision in *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973), in stating "[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators. K. Davis, Administrative Law Text 12.04, p. 250 (1972)."

IV. SEVERANCE OF THE REIMBURSEMENT PROVISION OF SECTION 16(e) IS NOT APPROPRIATE

If the reimbursement provision of section 16(e) is found unconstitutional, then the entire section must be declared invalid. The Solicitor General addresses the severability issue and in so doing quotes the following rule:

> "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped *if what is left is fully operative as law.*"
> *Champlin Refining Company* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). Accord, *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). Brief For Appellants, 33. (Emphasis Added)

This is unquestionably an accurate statement of the law. However, Jerrico maintains that this is the precise rule of law on which to base a decision holding that the reimbursement provision of section 16(e) is not severable from the remaining portion of the section. The operative language of this rule of construction is that part which reads, " . . . the invalid part may be dropped if what is left is fully operative as a law." The consistent theme, found throughout all of the cases supporting this rule of severability, is that the part to be severed and the remaining portion to be left intact must be independent of each other. Severance of the reimbursement portion of section 16(e) is not appropriate because the remaining portion of section 16(e) is dependent upon the reimbursement provision to direct the disposition of the civil money penalty funds.

The Solicitor General quotes the district court's opinion wherein Judge Gasch recognizes that it would be "simple and constitutionally sound [for] all civil money penalty funds [to be paid] directly into the Treasury of the United States." Brief For Appellants, 33. The Solicitor General goes on to state that this is the result that would obtain if severance were effected. *Ibid.* However, notwithstanding the Solicitor General's statement, there is nothing to suggest that this is what would necessarily result.[19] If the reimbursement clause of section 16(e) was

[19]Affidavit of Assistant Administrator Wage and Hour Division, ESA, U.S. Department of Labor, filed with appellants' Motion to Stay on May 17, 1979, indicates only that all monies collected on and after May 7, 1979, pursuant to section 16(e) are to held in *escrow* and deposited in an account with the United States Treasury until final judicial determination and resolution of the legal issues in the instant case.

severed, it is unclear where the civil money penalty funds would go.

Moreover, nothing but speculation can be offered as to what Congress might have intended as to an alternative disposition of the funds. Congress expressly provided for disbursement of the funds in the reimbursement provision of section 16(e). The Solicitor General's request that the Court presume that Congress would have wanted the funds to go directly into the Treasury of the United States is in direct conflict with the express intent of Congress. Certainly it is conceivable that Congress would prefer to earmark the funds for other lawful purposes related to the problems of child labor. Furthermore, a decision by the Court expressly mandating that the funds be paid directly into the Treasury, would not only contravene Congressional intent, but would, in effect, constitute impermissible judicial intervention in the legislative process.

The Solicitor General references the general severability clause of the Fair Labor Standards Act as evidence of Congressional intent to preserve any constitutional portion of the Act whenever possible. Brief For Appellants, 34. While this may demonstrate general Congressional intent, this simply is not an instance where severance is possible. Even the general severability clause is subject to the rule that whenever severance is to be carried out, the remaining portion of the statute must be "fully operative as a law." As discussed earlier, the remaining portion of section 16(e) would provide only for collection of civil money penalty funds without any direction as to their disposition.

Jerrico maintains that if the reimbursement provision is declared unconstitutional, the entire section should be declared invalid, properly reserving to Congress the power and discretion to promulgate a new civil money penalty provision providing for lawful disposition of the civil money penalty funds. Pending Congressional action, the Department of Labor would not be left without appropriate judicial remedies for enforcement of the child labor laws. The Department of Labor could pursue remedies through the injunctive and criminal sanctions that are provided for in sections 16(a) and 17 of the Fair Labor Standards Act.

The biasing nature of section 16(e) is intrinsic in the language of the section, having a potential effect on anyone who would read the statute. Even if this Court were to sever the provisions of section 16(e) relating to penalty reimbursement, allowing the remainder of the section to be enforced, the biasing influence of the statutory language would still affect all who read the section. Only actual notice of this Court's decision to sever and declare the reimbursement provision unconstitutional to each and every Department of Labor official affected by the provisions of section 16(e) could eliminate the impermissible potential for bias inherent in section 16(e). Appellee submits that judicial severance cannot achieve this result. Furthermore, the appearance of bias created by section 16(e) remaining in official and unofficial texts of the Act will not be cured by judicial severance. In this instance the Court should take notice of Mr. Justice Frankfurters's admonition, "Justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14 (1954). Jerrico maintains that the only method by which to correct the bias, the potential for bias, and the appearance of bias

inherent in section 16(e) is for this Court to declare the whole of section 16(e) invalid, thus affording the Congress the opportunity to promulgate a new child labor civil money penalty statute expressly providing for a lawful disposition of the funds.

Assuming *arguendo* that the Court finds severance to be an appropriate remedy, Jerrico maintains that the injunction issued by the district court should remain in full force and effect. Payment of penalties already assessed or collected into the Treasury of the United States would do nothing to correct the bias, the potential for bias, and the appearance of bias in the procedure as found by the district court in this assessment. It would be grossly inequitable for this Court to uphold the unconstitutionality of the reimbursement provision but then to order appellee to pay civil money penalties that were determined and assessed in violation of due process.

This Court should apply the general principle of statutory construction regarding prospective versus retroactive operation. When a statute determines the substantive rights of an individual or a group of individuals, it should be given prospective application only.[20]

If this Court affirms the decision of the district court that section 16(e) is an unconstitutional violation of due process, then regardless of its decision on the severability issue, appellees' civil money penalty liability was determined pursuant to an unconstitutional procedure and is therefore invalid.

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[20] *See, Haggar Co.* v. *Helvering*, 308 U.S. 389 (1942), *Hassett* v. *Welch*, 303 U.S. 303 (1938).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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No. 79-253

In the Supreme Court of the United States

OCTOBER TERM, 1979

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Appellee contends that "[a] person charged with a violation of the child labor laws may take exception *only* to the determination [by the assistant regional administrator] that the violation actually occurred" (Br. 46; emphasis in original). According to appellee, the administrative law judge may review de novo only the occurrence of the violation and not the amount of the penalty imposed (Br. 46-49). This contention is incorrect.

The applicable regulations provide that the administrative law judge is to review de novo *both* the fact of the violation and the propriety of the penalty imposed. Under these regulations, when an exception is filed to the notice of violation issued by the assistant regional administrator, "the final determination of the penalty

shall be made in an administrative proceeding" conducted before the administrative law judge. 29 C.F.R. 579.4(c). In that proceeding, the administrative law judge (29 C.F.R. 580.32(a)):

> may affirm, in whole or in part, the determination by the Administrator of the occurrence of violations or * * * may find that no violations occurred, and shall order payment of a penalty in the amount originally assessed or in a lesser amount * * * or order that respondent pay no penalty, as appropriate.

In determining de novo whether a penalty less than that originally assessed is appropriate, the administrative law judge is directed to consider the *very factors* initially considered by the assistant regional administrator. *Ibid.*, citing 29 C.F.R. 579.5.[1]

The administrative law judge is thus fully empowered to make a complete de novo review both of the existence of the violation and the appropriate penalty to be imposed.[2] Indeed, in the administrative proceedings that occasioned

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[1]These factors include, "among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours." 29 C.F.R. 579.5(c).

[2]Appellee incorrectly intimates (Br. 47-48) that the Secretary has argued in this case and others that the administrative law judge lacks authority to make a de novo review of penalty assessments. The Secretary has never espoused such a position. The sentence quoted by appellee (*ibid.*) from the Secretary's brief in the administrative proceedings in this case is quite plainly quoted out of context. When the relevant passage is read in its entirety, it is apparent that it

this litigation, even though the fact "[t]hat the violations occurred is undisputed" (A. 11), the administrative law judge reviewed the circumstances surrounding the

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contends only that the administrative law judge may not rule on constitutional attacks upon the penalty provisions of the Act; it supports the administrative law judge's authority to review de novo the reasonableness of the penalty assessment. The full passage reads:

> Clearly, there is no statutory grant of authority to an Administrative Law Judge under Section 16(e) of the Act nor under the applicable portions of the Administrative Procedure Act to consider or *to rule on constitutional issues.* The exception permitted by Section 16(e) is expressly limited to whether the violations for which the penalty is imposed actually occurred. This defines the scope of the matter to be heard by the ALJ and he cannot consider matters outside that scope.
>
> Furthermore, the Departmental regulations * * * also consider the ALJ's authority as limited to the occurrence of the violation *and the penalty imposed.*

Brief for the Secretary at 32 (emphasis added).

In *Marshall* v. *Sambo's Restaurants, Inc.*, Lab. L. Rep. (CCH) para. 31,311 (1979), on which appellee relies (Br. 48 n.17), the administrative law judge agreed that the applicable regulations authorized him to redetermine the amount of the assessed penalty de novo if an exception were filed to the occurrence of the violations. However, at the urging of the Department of Labor attorney assigned to that case, the administrative law judge then reached the admittedly "anomalous" result that he lacked any jurisdiction to act when the exception was limited to the amount of the penalty and did not attack the determination that a violation had occurred. The Secretary has never agreed with the latter aspect of the decision in *Sambo's Restaurants*. The Secretary's unvarying official position has been that his regulations authorize de novo review to determine the appropriate amount of the penalty to be imposed regardless of whether review of the determination of the violation is also sought. See, *e.g.*, *Marshall* v. *Teitel Enterprises, Inc.*, [Wages-Hours, Administrative Rulings, 1973-1978 Transfer Binder] Lab. L. Rep. (CCH) para. 31,186 (1978); *Marshall* v. *Swanson Brothers, Inc.*, [Wages-Hours, Administrative Rulings, 1973-1978 Transfer Binder] Lab. L. Rep. (CCH) para. 31,147 (1977). An isolated misstatement of that position by one of his attorneys, such as occurred in *Sambo's Restaurants*, cannot override

violations and reduced the penalty assessed against appellee from $103,000 to $18,500 (A. 12). This form of de novo administrative review to determine an appropriate penalty not only comports with the applicable regulations, but also is consistent with Congress' intent in enacting the penalty provisions of Section 16(e). The House Report states (H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 51 (1974) (emphasis added)) that:

> The Secretary is to determine the amount of the penalty and his determination is final unless exception is taken to the determination within 15 days thereof. If exception is so taken *the amount shall be determined in an adjudicatory proceeding* under [the Administrative Procedure Act].

2.*a*. Appellee contends that if this Court strikes down the reimbursement provision of Section 16(e), it must invalidate the statute in its entirety because the remaining portion would not be "fully operative as a law" (Br. 52, quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)). Appellee acknowledges, however, that, as the district court noted, it would be "simple and constitutionally sound [to] pay all civil money penalty funds directly into the Treasury of the United States" (Br. 53, citing J.S. App. 12a). Appellee

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the Secretary's regulations or otherwise thereby become the official position of the Secretary. See *Miller* v. *Youakim*, 440 U.S. 125, 144-145 n.25 (1979); *Hodgson* v. *Square D Co.*, 459 F. 2d 805, 809-811 (6th Cir.), cert. denied, 409 U.S. 967 (1972). Unlike the construction urged by appellee, the Secretary's interpretation of his regulations is plainly reasonable, is consistent with the legislative history, and does not create doubts as to its constitutionality. It should therefore not be disregarded. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 358-361 (1979); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

argues only that, if the creimbursement provision were removed from Section 16(e), nothing in the statute would provide for the payment of penalties to the Treasury.

But, in the absence of express language in a statute directing payment elsewhere, civil or criminal statutory penalties are always to be paid to the Treasury. Thus, numerous statutes provide only that a fine or penalty may be assessed without further directing that payment is to be made to the Treasury. See, *e.g.*, 18 U.S.C. 32, 41, 42, 205; 21 U.S.C. 333, 676; 46 U.S.C. 1228. In the instant case, there is ample basis for presuming that Congress would have preferred that penalty funds be paid directly into the Treasury rather than eliminate the civil penalty system altogether. The legislative history of Section 16(e) demonstrates that the overriding congressional concern behind enactment of Section 16(e) was to improve enforcement of the child labor prohibitions through imposition of a civil monetary sanction. The reimbursement provision was merely incidental to achievement of that basic congressional goal (see our principal brief at pages 34-35). Particularly in view of the Act's broad severability clause, payment of penalty funds into the Treasury would surely more nearly comport with Congress' intention than would "eliminat[ing] its policy altogether" (*Welsh* v. *United States*, 398 U.S. 333, 355-356 (1970) (Harlan, J., concurring)) by leaving enforcement of the nation's child labor laws to remedies already found to be generally ineffective.[3]

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[3]Moreover, appellee's objection reveals a misapprehension of the government's fiscal processes. Funds received by executive departments are ordinarily held in accounts in the Treasury. The reimbursement provision does not provide otherwise; its effect is merely to authorize a credit at the Treasury on behalf of the account maintained for the Employment standards Administration (ESA). Should this Court sever the penalty provision from the reimbursement provision and hold only the latter to be unconstitutional, the

b. Appellee argues that, if the Court severs the penalty provision of Section 16(e) from the reimbursement provision and holds only the latter to be unconstitutional, "the injunction issued by the district court should remain in full force and effect" (Br. 56). But the district court did not limit its relief to declaring unconstitutional, and enjoining enforcement of, the reimbursement provision. Instead, it permanently enjoined appellants "from enforcing section 16(e) * * * against [appellee] and * * * from requiring the payment of civil money penalties assessed against [it]" (J.S. App. 1a-2a; see also *id.* at 13a). It is apparent that, if the penalty provision is upheld and only the reimbursement provision is declared unconstitutional, the Secretary should not be enjoined from enforcing the penalty provision against appellee at least with regard to future violations of the Act. The injunction entered by the district court therefore should be reversed at least to that extent.

Moreover, even if the initial calculation of penalties by the assistant regional administrator in the administrative proceedings that gave rise to this litigation is deemed to have been improperly biased by the reimbursement provision of the statute, the district court should not have enjoined collection of the civil penalties that have been assessed against appellee for past violations of the Act. Even if the reimbursement provision of the statute is invalid and the penalty cannot be allocated to the regional administrator, imposition of the penalty in the de novo

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penalty funds would be paid directly into the general fund of the Treasury and ESA would simply be prohibited from using the penalty funds to meet its expenses pursuant to Section 16(e). Undistributed penalty proceeds automatically lapse to the general funds of the Treasury pursuant to 31 U.S.C. 701(a)(2).

proceeding before a neutral administrative law judge did not violate due process.[4] The penalty therefore properly should be paid into the Treasury.[5]

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

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[4]In view of the administrative law judge's findings that the occurrence of child labor violations in appellee's restaurants is "undisputed" and that appellee's "responsibility cannot be disputed" (A. 11), appellee cannot plausibly maintain that the Secretary's decision to cite it for violations of 29 U.S.C. 212 is attributable to the challenged provision of Section 16(e).

[5]Contrary to appellee's contention (Br. 26 & n.12) that Congress has been "kept in the dark" about the Secretary's civil penalty collection efforts, the Department of Labor submits to Congress substantial information concerning this category of "offsetting collections" in its annual budget requests and official reports. See, *e.g.*, *Budget of the United States Government, Fiscal Year 1980—Appendix* 651-652; United States Department of Labor, Employment Standards Administration, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: An Economic Effects Study Submitted to Congress* 28-30 (1978); *United States Department of Labor Sixty-Sixth Annual Report Fiscal Year 1978* 62, 92, 138.